No. 15-1248

Title:	McLane Company, Inc., Petitioner v. Equal Employment Opportunity Commission
Docketed:	April 6, 2016
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(13-15126)
Decision Date:	October 27, 2015
Rehearing Denied:	January 22, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Apr 4 2016	Petition for a writ of certiorari filed. (Response due May 6, 2016)
Apr 26 2016	Order extending time to file response to petition to and including June 6, 2016.
May 6 2016	Brief amicus curiae of Equal Employment Advisory Council filed.
Jun 7 2016	Order further extending time to file response to petition to and including July 6, 2016.
Jul 6 2016	Brief of respondent Equal Employment Opportunity Commission in opposition filed.
Jul 20 2016	DISTRIBUTED for Conference of September 26, 2016.
Jul 20 2016	Reply of petitioner McLane Company, Inc. filed. (Distributed)
Sep 29 2016	Petition GRANTED limited to Question 1 presented by the petition.
Oct 27 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party, received from counsel for petitioner.
Nov 2 2016	Letter from counsel for the respondent filed.
Nov 8 2016	Stephen B. Kinnaird, Esquire, of Washington, D.C., is invited to brief and argue this case, as amicus curiae, in support of the position that a district court's decision to quash or enforce an EEOC subpoena is subject to de novo review. Briefs of other amici curiae in support of the judgment below are to be filed within 7 days of the filing of the brief of Court-appointed amicus curiae.
Nov 14 2016	The brief of the Court-appointed amicus curiae is to be filed on or before January 10, 2017.
Nov 14 2016	Brief of petitioner McLane Company, Inc. filed.
Nov 14 2016	Joint appendix filed. Volumes I & II (Statement of costs filed)
Nov 18 2016	Consent to the filing of amicus curiae briefs in support of either party or neither party from counsel for the respondent.
Nov 21 2016	Brief amici curiae of Law Professors filed.
Nov 21 2016	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
Dec 14 2016	Brief of respondent Equal Employment Opportunity Commission filed.
Dec 22 2016	SET FOR ARGUMENT on Tuesday, February 21, 2017.
Dec 30 2016	Record requested from U.S.C.A. 9th Circuit.
Jan 10 2017	Brief of Stephen B. Kinnaird Court-appointed amicus curiae defending the judgment below filed.
Jan 13 2017	Record received from the U.S.C.A. 9th Circuit is electronic and located on PACER.
Jan 17 2017	CIRCULATED.

Jan 17 2017	Motion for allocation of argument time filed by respondent Equal Employment Opportunity Commission.
Jan 19 2017	Record received from the U.S.D.C. District of Arizona is electronic and located on PACER. Also received are SEALED documents that are electronic.
Jan 23 2017	Motion for allocation of argument time GRANTED.
Feb 8 2017	Reply of petitioner McLane Company, Inc. filed. (Distributed)
Feb 9 2017	Reply of respondent Equal Employment Opportunity Commission filed. (Distributed)
Feb 21 2017	Argued. For petitioner: Allyson N. Ho, Dallas, Tex. For respondent: Rachel P. Kovner, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For Court-appointed amicus curiae: Stephen B. Kinnaird, Washington, D. C.
Apr 3 2017	Judgment VACATED and case REMANDED. Sotomayor, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, Breyer, Alito, and Kagan, JJ., joined. Ginsburg, J., filed an opinion concurring in part and dissenting in part.
May 5 2017	JUDGMENT ISSUED.

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RECORD AND BRIEFS

15-1248

Supreme Court, U.S.
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In The

Supreme Court of the United States

MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's decision to quash or enforce an EEOC subpoena should be reviewed *de novo*, which only the Ninth Circuit does, or should be reviewed deferentially, which eight other circuits do, consistent with this Court's precedents concerning the choice of standards of review.

2. Whether the Ninth Circuit's decision to enforce an EEOC subpoena, depending upon a notion of relevance so broad that it effectively abrogates statutory limits on the EEOC's investigative powers, conflicts with *EEOC* v. *Shell Oil*, 466 U.S. 54 (1984) and the holdings of at least three other circuits.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption of this petition contains all parties to the proceedings.

Petitioner McLane Company, Inc. (McLane) was the Defendant and Appellee below. McLane is a non-public, wholly-owned subsidiary of Berkshire Hathaway, Inc. Berkshire Hathaway, Inc. is publicly traded on the New York Stock Exchange.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner McLane Company, Inc. respectfully submits this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The district court's order granting enforcement of the EEOC's subpoena in part, and quashing it in part, is unreported, and appears in the Appendix ("App."), at 18-34. The Ninth Circuit Court of Appeals Memorandum decision was issued on October 27, 2015 and appears at App. 1-17. The order of the court of appeals denying rehearing *en banc* is unreported. App. 34.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals' Memorandum decision was issued on October 27, 2015. On December 11, 2015, McLane timely petitioned the Ninth Circuit to rehear the appeal *en banc*. On January 22, 2016, the Ninth Circuit denied that petition. This Court has jurisdiction over this Petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the EEOC's investigative authority under 42 U.S.C. § 2000e-8(a).

> **42 U.S.C. 2000e (8)(a) Examination and copying of evidence related to unlawful employment practices**
> In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

INTRODUCTION

In granting the Equal Employment Opportunity Commission ("EEOC") subpoena authority, Congress limited that authority to inspecting and copying evidence "relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). In *EEOC* v. *Shell Oil*, 466 U.S. 54, 64 (1984), this Court explained how that limitation reflects "Congress' desire to prevent the [EEOC] from exercising unconstrained investigative authority." To ensure the EEOC exercises its subpoena power within statutory limits, this Court admonished that courts must be careful not to construe the

relevance requirement "in a fashion that renders that requirement a nullity." *Id.* at 69.

The Ninth Circuit's decision in this case irreconcilably conflicts with *Shell Oil*, and decisions of other courts of appeals faithful to it by enforcing a subpoena that amounts to an impermissible fishing expedition for irrelevant material far outside the scope of the charge under investigation. It does so by endorsing an unbounded theory of relevance that effectively erases the statutory limits on the EEOC's investigative authority. At the same time, the Ninth Circuit's decision exacerbates an acknowledged circuit split that pits that court against eight other circuits on the critical question of whether to review *de novo*, or instead with deference, district court determinations of *Shell Oil*'s touchstone limitation—relevance—in enforcing or quashing EEOC subpoenas. This Court should grant the petition to resolve both conflicts and bring the Ninth Circuit in line with this Court's precedents and the other circuits on these important questions. Uniform application of *Shell Oil*'s relevance limitation is especially necessary in an increasingly national economy where the EEOC conducts investigations that are national in scope. Additionally, uniform deference to district court determinations would empower district courts to do what they are better suited to do—hear evidence, make factual determinations, and understand a case in its totality—as well as discourage the forum shopping and protracted litigation that is fostered by the Ninth Circuit's present standard.

Given the sheer size of the Ninth Circuit—as well as the vast number of employers across the Nation with ties to that Circuit—the Ninth Circuit's departures from the precedent of this Court and the decisions of other circuits in this critically important (and rapidly growing) area of the law is serious, and warrants this Court's review. The Court should grant the petition, resolve the conflicts, and restore national uniformity on these substantial, important questions of law.

STATEMENT OF THE CASE

A. McLane, a Leading Distribution Company, Administers a Physical Capability Evaluation To Employees Returning From Absences in Excess of 30 Days, Including Damiana Ochoa.

McLane is a leading distribution company that buys, sells, and delivers more than 50,000 different consumer products to nearly 90,000 locations across the United States, including convenience stores, drug stores, and chain restaurants.

To ensure that its employees have the strength needed to safely perform the essential functions of positions identified as physically demanding, McLane requires all newly hired employees and all employees away from the physically demanding aspects of their position for more than 30 days to take a physical capability evaluation (the "Evaluation"). The Evaluation

is designed, administered, and evaluated by a third party, Industrial Physical Capability Services, Inc. ("IPCS"). ER 46; SER 44, n.1.

After taking maternity leave from August until the end of October 2007, respondent Damiana Ochoa—who worked for McLane's Arizona facility, McLane Sunwest—took the Evaluation three times: twice in November, and once again in December. *Ibid.* With each Evaluation, Ochoa failed to demonstrate the minimum physical capability for her particular position. As a result, she was released from her position. *Ibid.*

B. Ochoa Filed a Charge of Gender Discrimination, Mentioning the Americans With Disabilities Act, But Not the Age Discrimination in Employment Act.

In 2007, Ochoa filed a charge of discrimination alleging gender discrimination. The Ochoa Charge alleges:

> On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (Physical Capability Strength Test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007, and December 28, 2007, I retested and did not pass. I have worked for the above-named

> employer for over eight years as a cigarette selector.
>
> I believe I have been discriminated against because of my sex, female, (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> The physical capability strength test is given to all employees returning to work from medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended. ER 46.

As the Ochoa Charge admits, all newly hired McLane employees, as well as all employees away from the physically demanding aspects of their jobs for more than 30 days, must take the evaluation to ensure that they have the strength needed to safely perform the essential functions of any position identified as physically demanding. Neither the EEOC nor Ochoa nor any court in this matter has ever suggested that the Evaluation policy is selectively enforced based on sex or pregnancy. And as to the reference to disability in the charge, Ochoa has never alleged that she is disabled. SER 45.

C. The EEOC Investigated the Ochoa Charge, Issuing Subpoenas and Pursuing Two Separate Enforcement Actions, One Concerning the Age Discrimination in Employment Act.

In 2009, after beginning its review of the Ochoa Charge, the EEOC greatly expanded the scope of its investigation, far beyond Ochoa's localized sex discrimination charge. The EEOC sought nationwide information about all McLane facilities, business divisions, and related entities, even though Ochoa only worked for McLane Sunwest, McLane's Arizona affiliate. The EEOC also sought information about age—though the Ochoa Charge never mentions age, and though Ochoa was under the age of 40 when she filed the charge.

McLane gave the EEOC information consistent with the scope of the Ochoa Charge, and objected to the requests for matters not relevant to it. SER 45. The EEOC responded by saying it would expand the investigation of Ochoa's Title VII charge into a far broader inquiry into the "nationwide compliance" with the Age Discrimination in Employment Act ("ADEA") by McLane-related corporate entities across America. Lacking any charge of age discrimination against McLane to serve as an anchor for these expansive requests, the EEOC simply added an additional charge number—but no actual charging party—to its request for information. SER 46, 48. The EEOC did not point to any evidence that led to this expanded investigation, as no age-related information

had been provided to the EEOC. Nor did the EEOC explain why a nationwide inquiry into ADEA compliance in McLane's extended corporate family was within the scope of the Ochoa Charge. The EEOC's justification for this greatly expanded investigation was that it was "looking for victims." SER 48.

McLane sought to cooperate with the EEOC, and requested a meeting with the EEOC to work out what might be a data set manageable to produce, but which would be acceptable to the EEOC. SER 48-49. Instead of attempting to resolve the issue through discussions with McLane, the EEOC issued two almost identical subpoenas. One related to the Ochoa Charge ("the Ochoa Subpoena"). ER 46, 89. The other related to the ADEA charge number that lacked any charging party ("the ADEA Subpoena"). SER 49. McLane petitioned the EEOC to revoke the Ochoa Subpoena. ER 98; SER 49. The EEOC denied that petition. ER 124.

McLane then responded to the EEOC's Subpoenas by providing substantial information, but without waiving its objections to the production. SER 61. Though Ochoa only worked at McLane Sunwest, McLane produced information about all persons who had participated in the Evaluation nationwide. McLane produced for each such person: (1) a unique identification number; (2) the location where they worked; (3) their sex; (4) why they took the Evaluation; (5) the job they sought; (6) the physical capability achieved; and (7) whether that capability met the minimum for the job they sought.

McLane continued to seek a meeting with the EEOC to try to discuss the Ochoa Charge and assuage any concerns about the Evaluation, and also to confer about the Ochoa Charge and ADEA Subpoenas, including the relevance of their broad requests to that charge. SER 51-52. The EEOC did finally meet with McLane, but declined to confer substantively, and simply asked McLane to respond—in full—to the subpoenas. SER 52. Underscoring its cooperation, McLane then produced more information and documents, including job task analyses and related videos. SER 60, 62.

D. The EEOC Enforced the ADEA Subpoena and the Ochoa Subpoena With Considerable, But Not Total, Success.

The EEOC then sued to enforce the ADEA Subpoena. In the ADEA Lawsuit, the EEOC sought information for all current and former employees and applicants nationwide—the very information initially sought in the Ochoa Charge investigation that the EEOC described as necessary to find "victims." *EEOC* v. *McLane Co., Inc.*, No. CV-12-615-PHX-GMS, 2012 U.S. Dist. LEXIS 47443, at *2 (D. Ariz. April 4, 2012). SER 48.

The district court received briefing and held a hearing on the EEOC's requests, and McLane's objections. The district court exercised its discretion and enforced the ADEA subpoena in part, balancing the EEOC's authority to investigate against the jurisdictional limit on that authority that is the scope

of the charge. *McLane Co., Inc.*, 2012 U.S. Dist. LEXIS 47443, at **14-21. The district court concluded that the EEOC's stated scope of investigation—to determine whether the Evaluation represents a tool of age discrimination *in the aggregate*—warranted nationwide statistical data. *Id.* at *14.

The district court, however, upheld McLane's objection to the EEOC's request for personal pedigree information, including names, addresses, phone numbers, and Social Security numbers for the thousands of persons who have taken the Evaluation. *Id.* at *21. The district court determined that providing information as to why any particular employee who took the Evaluation was terminated created an undue burden, and declined to order that information produced. The district court did, however, order McLane to produce information as to whether any person who took the Evaluation suffered an adverse employment action within 90 days (whether or not the action related to the Evaluation). *Id.* at *18. McLane complied. *Ibid.*

Rejecting its substantial-but-not-total victory in enforcing its subpoena, the EEOC then sued a second time in the same district court to seek the same pedigree information, this time by enforcing the Ochoa Subpoena. ER 134. The parties made the same arguments all over again. The EEOC repeated its claims that it has the authority to request pedigree information, and that it needed to contact all Evaluation participants to see if they were disabled and if they would otherwise have been qualified to do

the job they sought. SER 19-23, 91. McLane argued that analyzing thousands of files to produce the reasons for termination of everyone who had ever taken the Evaluation was an undue burden. SER 87-88.

The district court enforced the Ochoa Subpoena to the same extent it enforced the ADEA Subpoena. ER 10-11. The district court again compelled McLane to produce nationwide statistical data concerning every single Evaluation participant. ER 10-11. But the district court again declined to order McLane to provide nationwide pedigree information. The district court reasoned that the EEOC's "primary motivation for obtaining the pedigree information related to the ADA charge" was irrelevant as Ochoa was not disabled. App. 28. The generic reference to the ADA in the charge—in the absence of any aggrieved party—was insufficient to confer authority on the EEOC to obtain the pedigree information. ER 7. Further, the EEOC had not shown that nationwide pedigree information was relevant to the charge of sex discrimination, at least at this stage of the investigation. ER 8-9. The district court again declined to order McLane to explain—for each person who ever took the Evaluation and was terminated—the reason for termination. App. 29.

E. The Ninth Circuit Reviewed the District Court's Decision *De Novo*, and Reversed the District Court's Decision To Quash the Ochoa Subpoena in Part, Relying on a Broad Notion of Relevance.

The EEOC appealed to the Ninth Circuit the District Court's denial in part of the Ochoa Subpoena. The Ninth Circuit reviewed the District Court's decision *de novo*. The Ninth Circuit candidly noted that it was unclear why it applies a *de novo* standard of review to District Court determinations concerning agency subpoenas, while other Circuits review those determinations for abuse of discretion. App. 11 (citing *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 295 (3d Cir. 2010); *EEOC* v. *United Air Lines*, 287 F.3d 643, 649, 654 n.6 (7th Cir. 2010)).

Without referring to the actual language of the charge, the Ninth Circuit nonetheless held that the pedigree information was relevant to the EEOC's investigation of the charge. The EEOC had abandoned its disability-discrimination theory in the Ninth Circuit and, instead, focused solely on the Title VII charge the district court found unpersuasive. In the Ninth Circuit's view, the information requested could assist the EEOC in investigating sex discrimination, and according to the Ninth Circuit, there was no undue burden in producing Social Security numbers. App. 10-11.

The Ninth Circuit denied McLane's petition for rehearing *en banc*. App. 35. This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

The circuits are split on two related, important questions concerning the enforcement of EEOC subpoena requests—which are on the rise across the Nation.

First, the Ninth Circuit—while conceding it is unclear why it does so—applies a *de novo* standard of review to a district court's determination of the relevance of information sought by subpoena in the course of an agency investigation. In doing so, the Ninth Circuit has departed from the other circuits that have considered the question, which have recognized that appellate courts should not substitute their own judgments for those of district courts on determinations involving mixed questions of law and fact traditionally left to the discretion of trial courts. The majority view—of affording district courts deference in these matters—is compelled by this Court's precedents on standards of review generally. Given that the standard of review not only frequently determines the outcome of an appeal, but also, in this particular context, can affect agency behavior going forward, this Court should grant the petition and bring the Ninth Circuit in line with the other circuits, and also this Court's precedents.

Second, the Ninth Circuit has departed from this Court's precedents (most notably *Shell Oil*) and the decisions of other circuits by illicitly expanding the jurisdictional limits set by Congress on the EEOC's investigative authority. In *Shell Oil*, this Court plainly admonished the lower courts that the charge document sets out the metes and bounds of the agency's investigation. 466 U.S. at 72. Regrettably, however, the Ninth Circuit has ignored that warning—and has effectively allowed the EEOC to pursue investigations untethered to the charge, and thus without any meaningful constraints. This case is paradigmatic. The Ninth Circuit allowed the EEOC to obtain information based on the possibility of violations of one statute (Title VII), after the EEOC justified its subpoena to the district court based on potential violations of another statute (ADA), which does not even apply to the worker making the charge. Thus in the Ninth Circuit, a mere generic charge of "discrimination" can now open a company's records (including sensitive, personal employee information) to any and all requests by the EEOC—even requests on grounds entirely different from those in the individual's charge. This Court's review is needed to bring the Ninth Circuit in line with other courts of appeals that respect the jurisdictional limits on the EEOC's investigative authority set out by this Court in *Shell Oil*. Given the significant recent rise in EEOC enforcement actions—which affect companies and workers in virtually every industry across the Nation—the need for this Court's guidance is especially pressing.

I. THE COURT SHOULD REVIEW THIS CASE TO RESOLVE THE CONFLICT AMONG NINE CIRCUITS ON AN ISSUE OF EXCEPTIONAL IMPORTANCE—THE STANDARD FOR REVIEWING DISTRICT COURT RELEVANCE DETERMINATIONS IN AGENCY ENFORCEMENT ACTIONS.

A. The Other Circuits Are Right: District Court Decisions Reviewing Agency Subpoenas Should Be Reviewed Deferentially, Not *De Novo*.

The Ninth Circuit itself questions why it stands alone in reviewing *de novo* the determinations of district courts regarding the enforceability of agency administrative subpoenas. App. 8 (citing *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 295 (3d Cir. 2010); *EEOC* v. *United Air Lines, Inc.*, 287 F.3d 643, 649, 654 n.6 (7th Cir. 2002)).

That court is right to question why it stands alone on that issue. Every other Circuit that has addressed this issue has held that a more deferential review of relevancy determinations—either for abuse of discretion or clear error—is appropriate. *See, e.g.*, *FTC* v. *Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 148 (D.C. Cir. 2015) (abuse of discretion); *EEOC* v. *Royal Caribbean Cruises*, 771 F.3d 757, 760 (11th Cir. 2014) (abuse of discretion); *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 295 (3d Cir. 2010) (abuse of discretion); *Fresenius Med. Care* v. *United States*, 526 F.3d 372, 375 (8th Cir. 2008) (abuse of discretion); *NLRB* v. *Am. Med. Response, Inc.*, 438 F.3d 188, 193 (2d Cir. 2006)

(clear error); *EEOC* v. *United Air Lines, Inc.*, 287 F.3d 643, 649 (7th Cir. 2002) (abuse of discretion or clear error); *United States* v. *Chevron U.S.A., Inc.*, 186 F.3d 644, 647 (5th Cir. 1999) (abuse of discretion); *Reich* v. *Nat'l Eng. & Contracting Co.*, 13 F.3d 93, 98 (4th Cir. 1993) (clear error). This Court could, but need not, decide between the more deferential standards of abuse of discretion or clear error. It would create harmony among the Circuits to remand with a direction to apply either standard, or to apply one particular standard among the two.

This striking Circuit split—eight Circuits against one—results from a disconnect between this Court's precedents governing the selection of a standard of review and the chosen standard, as explained next. Following this Court's precedents on the selection of a standard of review would foster not only uniformity among the Circuits, but also a proper respect for the role of district courts in determining issues of relevance and burden, which are best commended to their expertise and frontline judgment.

B. The Ninth Circuit's *De Novo* Review Contradicts This Court's Direction as to How Courts Must Choose Standards of Review, and Reflects Insufficient Deference to the District Court's Role.

De novo review here cannot be squared with this Court's precedents on choosing the proper standard of review generally. *See Pierce* v. *Underwood*, 487 U.S. 552, 557-62, 108 S. Ct. 2541, 2546-48 (1988); *see also*

Rita v. *United States*, 551 U.S. 338, 362-63, 127 S. Ct. 2456, 2471-72 (2007) (applying *Pierce* and explaining importance of district court's direct connection to subject matter adjudicated to choice of abuse of discretion as standard). For example, in *Pierce*, the underlying issue was whether a legal position taken by the Secretary of Housing and Urban Development under the Equal Access to Justice Act was "substantially justified." In that comparable situation, this Court held that a mixed question of law and fact (like that at issue in the instant case) should be reviewed only for abuse of discretion. 487 U.S. at 560.

The touchstone of the analysis is district court competency. This Court explained that the choice of the proper standard of review "turn[s] on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Pierce*, 487 U.S. 559-60 (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985)). A deferential standard of review is appropriate where mixed questions of law and fact are concerned, this Court decided, because (among other reasons) district courts "may have insights not conveyed by the record," *ibid.*

Here, the district court likewise had a mixture of law—both Title VII and this Court's construction of relevancy in *Shell Oil*—to apply to facts including the charge at issue, the course of dealing between the EEOC and McLane, the investigation to date, and issues of burden to McLane. ER 1-11. Just as the *Pierce* Court concluded that the district court "may

have insights not conveyed by the record," *see Pierce*, 487 U.S. at 560, the district court presumably did here as well, as it saw the EEOC greatly shift its theories and explanations of its investigation over several years. The district court had to weigh the tenuous or nonexistent relationship of some of the EEOC's requests to the Ochoa Charge, on one hand, against considerations of burden and fairness to McLane, on the other. A district court's "insights not conveyed by the record" are the ones lost or ignored by subjecting its exercise of discretion to *de novo* review. The eight Circuits that review such district court decisions deferentially are right to recognize that the district court is best positioned to judge these matters, just as it was here.

That *Pierce* should compel deferential review of district court determinations about agency subpoenas is reinforced by closely related law: the standards of review of subpoenas and discovery issues generally. Reviewing courts defer to district courts as they handle those issues because—interactively and iteratively—they can better assess parties' needs, the veracity of their explanations, the resources they have (or have not) expended, and a host of prudentially significant facts that inform judgments about subpoenas and discovery issues. *See, e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 702 (1974) ("Enforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues.");

see also Gile v. *United Airlines, Inc.*, 95 F.3d 492, 495 (7th Cir. 1996) ("A district court is in the best position to decide the proper scope of discovery and to settle any discovery disputes."). So it should be here with respect to district court rulings about the validity of agency subpoenas in enforcement actions before those courts.

With respect to EEOC matters, the particularity of charges, investigations, and subpoenas—the things that make them grist for district courts—make them "multifarious and novel." *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748-49 (2014). Like discovery subpoenas in civil litigation, they are thus "not susceptible to 'useful generalization' of the sort that *de novo* review provides, and 'likely to profit from the experience that an abuse-of-discretion rule will permit to develop.'" *Ibid.*

The courts of appeals are far less well-equipped to resolve these issues, given the cold, static appellate records they receive. *See Pierce*, 487 U.S. at 560 ("Even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense."). Unlike district courts, reviewing courts cannot iterate a discussion with counsel over time, asking questions and holding additional hearings to determine what approach is best. Unlike district courts, they cannot hear live testimony where appropriate to assess the credibility of either side's explanations. And unlike district courts, they do not have a continuing relationship with the subject matter of

the litigation, which gives them not only more context in which to judge discovery and subpoena disputes, but also a chance to balance how different issues are treated in relation to each other. *Rita* v. *United States*, 551 U.S. 338, 362-63 (2007) (applying *Pierce* and explaining that a district courts' direct connection to specific facts and issues of a case counseled in favor of an abuse of discretion standard).

This Court should issue the writ here, and review the Ninth Circuit's decision, especially given that court's own observation that it is unclear why it performs *de novo* review in this area. Reversal here to confirm that abuse of discretion or clear error is the right standard would make the district courts and the courts of appeals the complementary partners they should be, with differing competencies and focuses. Each should have respect for the other's primacy in their respective roles in the federal judiciary. This Court should grant the petition to restore that balance, resolve the circuit split, and restore uniformity on an important issue of federal law and procedure.

II. THE COURT'S REVIEW IS NEEDED BECAUSE THE DECISION BELOW IGNORES STATUTORY LIMITS ON THE COMMISSION'S AUTHORITY, IN CONFLICT WITH DECISIONS OF THIS COURT AND MANY CIRCUITS.

A. The Decision Conflicts With *Shell Oil*, Which Taught That the Touchstone of Enforcing or Quashing an EEOC Subpoena Is Relevance to the Facts in the Relevant Charge.

The Court should issue the writ, because the Ninth Circuit's notion of relevance in the decision below is so broad that it cannot be squared with *Shell Oil*. This Court warned against "render[ing] nugatory the statutory limitation of the Commission's investigative authority to materials 'relevant' to a charge." 466 U.S. at 72. But the Ninth Circuit's decision in this case does just that—setting a bar for relevance so low that even the loosest and most attenuated connection to the charge will suffice, thus effectively nullifying the jurisdictional limits on the EEOC's investigative authority.

The critical part of the analysis here is the degree of connection between a charge, and a subpoena. Congress limited the Commission's jurisdiction to investigate by requiring a connection between an exercise of its investigative powers and a charge of discrimination already under investigation. *Shell Oil*, 466 U.S. at 64. "Courts," therefore, "must be careful not to construe the charge and relevance requirements so

broadly as to confer 'unconstrained investigative authority' upon the EEOC." *Kronos*, 620 F.3d at 297. Though the Commission is not required to ignore evidence of additional claims of discrimination that arise through a reasonable investigation of the charge, it must pursue its investigation with a "realistic expectation rather than an idle hope that something may be discovered." *United Air Lines, Inc.*, 287 F.3d at 653 (7th Cir. 2002) (citation omitted). The relevance requirement "cabin[s] the EEOC's authority and prevent[s] fishing expeditions." *Ibid.*

Accordingly, courts must examine the scope of the Commission's authority not by reference to the generic charge of discrimination—which every charge must contain, *see, e.g.*, ER 46—but by reference to the facts the charge alleges. The Ninth Circuit itself has acknowledged that the "crucial element of a charge of discrimination is the factual statement" that it contains. *Freeman* v. *Oakland Unified Sch. Dist.*, 291 F.3d 632, 636 (9th Cir. 2002) (quoting *B.K.B.* v. *Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002)). Hence, when Ms. Ochoa alleged that McLane discriminated on the basis of sex by requiring all employees to undertake a physical capabilities evaluation, the district court determined—consistent with *Shell Oil*—that the identifying information the Commission sought to pursue age-discrimination and disability-discrimination claims simply bore too attenuated a relationship to the charge's factual core.

The Ninth Circuit's decision, however, will virtually always permit the EEOC to gather the personal identifying information of every employee of an investigated business—so long as the potential interviewees could conceivably "cast light on the allegations against" the employer. App. 9-10.

But no reading of *Shell Oil*—which rejected a Commission proposal that the bare allegation of a charge of discrimination would suffice, 466 U.S. at 72—comports with this attenuated notion of relevance. *See* App. 9. The Ninth Circuit's decision would allow a relationship between sought-after material and an under-investigation charge so remote or speculative as to create perverse incentives for the Commission to issue or encourage generic, conclusory allegations over discrete, factual allegations in charges—thereby rendering "nugatory the statutory limitation of the Commission's investigative authority to materials 'relevant' to a charge." *Ibid.* Indeed, it is theoretically possible that virtually any confidential document in McLane's files—from its truck routes to its corporate minutes—"might" provide some information that could "shed light" on whether the Evaluation is discriminatory. That understanding of relevance extends far beyond the one this Court expressed in *Shell Oil*, and thus, far beyond the Commission's statutory authority.

B. The Ninth Circuit's Decision Conflicts With the Decisions of Other Circuits that Have Rejected the Commission's Overextensive Theories of Relevance.

Unfortunately, the Ninth Circuit's decision conflicts with not only *Shell Oil*, but also with the decisions of other courts of appeals rejecting similarly unbounded theories of relevance advanced by the Commission. For example, in *EEOC* v. *United Air Lines, Inc.*, an American employee alleged national-origin discrimination based on United Airlines's failure to contribute to the French social-security system on behalf of its American flight attendants. 287 F.3d at 646, 653. This failure resulted in the French authorities rejecting a particular American employee's temporary disability claim, and prompted a Commission investigation into "each and every benefit" provided to United's French employees. *Id.* at 654. The Seventh Circuit refused such a broad request, describing the Commission's arguments for the subpoena as "feeble" and "unconvincing." *Ibid.* To be sure, there was some relationship between the benefits that United provided to French employees and the American employee's national-discrimination claim. But the Seventh Circuit—like the district court—considered such a relationship insufficient.

The Eleventh Circuit similarly rejected another especially aggressive Commission subpoena. In *Royal Caribbean Cruises*, Royal Caribbean refused to renew an HIV-positive assistant waiter's employment contract because of his medical condition, and the

waiter alleged disability discrimination. 771 F.3d at 759. In response, the Commission sought information on all individuals either not hired or discharged for medical reasons. *Id.* The Commission defended its incredibly broad subpoena on the basis that the Commission "is entitled to expand the investigation to uncover other potential violations" of the same type. *Id.* at 761. But the relevance standard did not extend so far. "The relevance that is necessary to support a subpoena for the investigation of an individual charge is relevance to the contested issues that must be decided to resolve that charge, not relevance to * * * future charges [that may be] brought by others." *Id.* The Eleventh Circuit described this relationship as "tenuous," simultaneously concluding the subpoena sought irrelevant information and that it was unduly burdensome. *Id.* at 763.

In *Burlington N. & Santa Fe R.R.* v. *White*, 669 F.3d 1154, 1157-58 (10th Cir. 2012), the Tenth Circuit also measured the facts of the charges at issue against the broad information sought by the EEOC. In particular, the EEOC argued that "[i]f a pattern or practice of disability discrimination * * * exists, the discrimination allegedly suffered would appear to be a part of it." *Id.* at 1157. Focusing on the specific charges at issue, the Tenth Circuit explained that "[a]ny act of discrimination could be part of a pattern or practice of discrimination, but not every charge of discrimination warrants a pattern or practice investigation." *See also EEOC* v. *Packard Electric Div.*, 569 F.2d 315, 316-18 (5th Cir. 1978) (holding that the

district court did not err in limiting the EEOC's subpoenas to tailor disclosure to the character of the particular charges made rather than allowing the EEOC to obtain "broad statistical information as to the respective employers' entire work force").

Regrettably, these examples are far from exhaustive—or isolated. The Commission often presses its subpoena powers beyond their statutory scope "merely as an expedient bypass of the mechanisms required" to pursue other statutory powers. *Id.* at 762. The Commission receives between 80,000 and 90,000 charges annually, and it often responds to even questionable charges with voluminous subpoenas. "Today's EEOC * * * is pursuing many questionable cases through sometimes aggressive means," as one Staff Report puts it, and these aggressive means unnecessarily burden employers. Minority Staff Report by the United States Senate Committee on Health, Education, Labor, and Pensions.

The Ninth Circuit's decision's capacious relevance standard can only encourage the Commission to pursue enforcement actions for subpoenas of "tenuous relevance." *Royal Caribbean*, 771 F.3d at 762. And the EEOC's increasingly aggressive enforcement philosophy makes the need for judicial oversight even more acute—as the EEOC's own personnel have attested, "[a]dministrative investigations" under the Commission's most recent strategic plans "are virtually certain to involve *higher stakes, stakes of a different order of magnitude* * * * *" given the agency's focus on pursuing "systemic" discrimination. *See*

Drafting of a New Strategic Enforcement Plan by the Strategic Enforcement Plan Work Group, Public Input into the Development of EEOC's Strategic Enforcement Plan, Meeting of July 18, 2012 (written testimony of John Hendrickson, Chicago District Office, EEOC) (emphasis added).

Notably, every charge alleges some form of discrimination—it is a box on the form to be checked. *See, e.g.*, ER 46. Contrary to other Courts of Appeals that have trained their legal analysis on the nexus between the sought-after information and the charge itself, the Ninth Circuit's decision effectively vests the EEOC with virtually unfettered authority that Congress never authorized and the Supreme Court expressly disavowed. If permitted to stand, the decision would render the relevance requirement a nullity in direct contravention of this Court's decision in *Shell Oil* and the decisions of several other Circuits. This Court's review is necessary to resolve this conflict, too.

III. THE QUESTIONS PRESENTED INVOLVE ISSUES OF EXCEEDING NATIONAL IMPORTANCE.

Circuit splits involving federal administrative agencies naturally lend themselves to this Court's review, *see, e.g.*, *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645 (2015), and this case is no exception. *First*, the proper standard of review for a district court's determination that the EEOC is entitled to information

because it is relevant to the charge and not unduly burdensome is of substantial importance not only because it is often dispositive of the outcome of the appeal, and not only because it maintains the proper relationship between trial and appellate courts and their respective capabilities and expertise, but also because it can have a significant effect on agency behavior ex ante. *Second*, the proper standard for ensuring that the EEOC does not exceed its jurisdiction to investigate potential violations is also vitally important because of the potential for subjecting not only employers to great extra-statutory exposure and expense, but also employees to the release of highly personal and confidential information. These questions are of substantial importance and warrant review now.

This Court has long recognized the vital importance of the proper standard of review. The "'standard for appellate review'" is "'[a]n essential characteristic of [the federal court] system.'" *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 431 (1996) (alterations in original) (citations omitted). This Court has also recognized "that the difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.'" *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 238 (1991) (quoting *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984)).

Underscoring the issue's importance, the choice between *de novo* review and review for abuse of discretion often determines the outcome. *See Dickinson*

v. *Zurko*, 527 U.S. 150, 162 (1999) ("The upshot" is a "practical difference in outcome de-pending upon which standard is used."). And it was outcome-determinative here. Under the deferential standard applied by the eight other Circuits, the EEOC would have had to demonstrate that the district court abused its discretion (or clearly erred) in finding that the subpoena—which the EEOC based on two previous, abandoned theories—sought information too attenuated from Ochoa's sex-discrimination charge to enforce.

Further highlighting the importance of the issue is that standard of review is critical to the proper resolution of tens of thousands of charges the EEOC processes every year. Subpoena enforcement determinations, like other questions about the abuse of judicial process, are properly vested with the district courts, subject only to deferential appellate review. The Ninth Circuit's contrary approach encourages forum shopping, causes national disunity on this important question of administrative law, and, in this case, led to an incorrect resolution before the Ninth Circuit.

Further, the fact that the Ninth Circuit is the outlier makes the need for this Court's review even more pressing, given the number of cases and enforcement orders that arise from that Circuit. That improper understanding of *Shell Oil* translates into an inordinately large number of employers exposed to both the *de novo* standard of review—which favors the agency—and the broad rationale offered by the

EEOC for why it should be allowed to undertake fishing expeditions such as the one in this case. On top of that, virtually any "nationwide" company will have employees in some part of the Ninth Circuit. This means that the EEOC need only find a potential plaintiff in California, for example, to be able to sift through employer records across the country. The circuit splits raising these significant issues warrant immediate review by this Court.

IV. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED.

This case presents an ideal vehicle for resolving these entrenched splits because the questions of law decided by the Ninth Circuit lend themselves to immediate resolution by this Court. While the question of enforcement of a subpoena is a mixed question of law and fact, the operative rules by which district courts must conduct that analysis are purely legal. No further development or percolation on these questions is needed, especially given the pronounced splits that exist on these important questions—not to mention that the Ninth Circuit has recently refused to resolve the split itself, and there is no reason to think it will do so in the foreseeable future.

This case is a particularly good vehicle for resolving the standard-of-review issue, because it was outcome-determinative here and exemplifies why deferential review is appropriate. The district judge

was intimately familiar with: (i) the facts alleged in the charge; (ii) the previous subpoena enforcement action; (iii) the parties' conduct through the litigation process; and (iv) the EEOC's evolving theories of purported relevance. Of particular note here, the Commission's shifting justifications over time for its pursuit of the same information provided the district court with a strong clue that the information the Commission seeks is not relevant to the filed charge it is (purportedly) investigating. Yet the Ninth Circuit, applying *de novo* review, gave no deference to the district court's situational awareness of this litigation. This case exemplifies the error of the Ninth Circuit's ways and is thus an ideal vehicle for bringing that Court in line with the other circuits.

This case also cleanly presents the related conflict with *Shell Oil* and its mandate concerning judicial enforcement of the statutory limits on the EEOC's authority. Unable to obtain the broad information sought under a generic charge, the EEOC sought to backdoor its way to that same information by bootstrapping an ADEA subpoena onto a Title VII charge that did not even mention the ADEA. Wherever the outer limits of the EEOC's investigative authority may lie, the Ninth Circuit's decision allowing the EEOC to proceed in this fashion is far beyond them. This case therefore presents this Court with an important opportunity to rein in the Ninth Circuit, close the loophole it has created, and restore the proper bounds of the EEOC's authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff-Appellant,* v. MCLANE COMPANY, INC., *Defendant-Appellee.*	No. 13-15126 D.C. No. 2:12-cv-02469-GMS OPINION

Appeal from the United States District Court
for the District of Arizona
G. Murray Snow, District Judge, Presiding

Argued and Submitted
March 12, 2015 – San Francisco, California

Filed October 27, 2015

Before: J. Clifford Wallace, Milan D. Smith, Jr., and Paul J. Watford. Circuit Judges.

Opinion by Judge Watford;
Concurrence by Judge M. Smith

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OPINION

WATFORD, Circuit Judge:

This is a subpoena enforcement action brought by the Equal Employment Opportunity Commission (EEOC) against McLane Company. The EEOC is investigating a charge of sex discrimination filed against McLane by one of its former employees, who was fired when she failed to pass a strength test after returning from maternity leave. The subpoena seeks information about the company's use of the test and the individuals who have been required to take it. The main issue before us is whether the district court correctly held that some of the information sought by the subpoena is not relevant to the EEOC's investigation. The court refused to enforce that portion of the subpoena, and the EEOC has appealed.

I

In January 2008, Damiana Ochoa, a former employee of a McLane subsidiary in Arizona, filed a charge with the EEOC alleging sex discrimination (based on pregnancy) in violation of Title VII of the Civil Rights Act of 1964. Ochoa alleged that when she tried to return to work after taking maternity leave,

McLane informed her that she could not resume her position as a cigarette selector – a position she had held for eight years – unless she passed a physical capability strength test. Ochoa alleged that the company requires all new employees and all employees returning to work following a medical leave to take the test. Ochoa took the test three times but failed to receive a passing score on each occasion. Based on her failure to pass the test, McLane terminated her employment.

The EEOC notified McLane of Ochoa's charge and began an investigation. During the early stages of the investigation, McLane disclosed that it uses the strength test at its facilities nationwide for all positions that are classified as physically demanding. All new applicants for such positions and employees returning to such positions from a leave longer than 30 days are required to pass the test as a condition of employment.

McLane voluntarily provided general information about the test and the individuals who had been required to take it at the Arizona subsidiary where Ochoa worked. That information included each test taker's gender, job class, reason for taking the test, and score received (pass or fail). However, McLane refused to disclose what the parties have referred to as "pedigree information" for each test taker (name, social security number, last known address, and telephone number). Instead of identifying the test takers by name and social security number, McLane identified them only by an "employee ID number" created

solely for purposes of responding to the EEOC's investigation. McLane also refused to disclose, for those employees who had taken the test and were later terminated, when and why their employment was terminated.

The EEOC eventually expanded the scope of its investigation to include all McLane facilities nationwide within the grocery division (the division in which Ochoa worked), since all of those facilities used the same test for the same purposes. The EEOC sought the same information described above for each of the test takers at McLane's facilities nationwide. McLane ultimately provided most of that information, but it again refused to provide either pedigree information or, for those test takers who were ultimately terminated, the reasons for termination.

The EEOC then issued an administrative subpoena demanding production of the withheld information. McLane petitioned the EEOC to revoke or modify the subpoena, but the agency denied the petition. Upon McLane's continued refusal to provide the disputed information, the EEOC filed this subpoena enforcement action.

The district court granted in part and denied in part the EEOC's request for enforcement. The court required McLane to disclose the following information: the gender of each test taker, the date the test was given, the score the test taker received, the position for which the test was taken, the passing score for the position in question, and any adverse

employment action imposed within 90 days of an employee's taking the test. (McLane had already provided some, but not all, of that information.) The court refused to enforce the subpoena to the extent it required McLane to divulge two categories of information: (1) the pedigree information for each test taker; and (2) for those employees who were terminated after taking the test, the reasons for termination. With respect to the pedigree information, the court concluded that the EEOC did not need such information to determine whether McLane had used the test to discriminate on the basis of sex. Thus, in the court's view, the information was not relevant at this stage of the EEOC's investigation. With respect to the reasons for termination, the court did not explain why it refused to require production of that information. However, in a parallel subpoena enforcement action the EEOC brought against McLane under the Age Discrimination in Employment Act (ADEA), the court had earlier ruled that providing information about whether an adverse employment action was directly triggered by taking the test (as the EEOC had requested) would be unduly burdensome. *EEOC v. McLane Co.*, 2012 WL 1132758, at *6 (D. Ariz. Apr. 4, 2012).[1]

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[1] The EEOC has dismissed the appeal it filed in the ADEA action. And although Ochoa's charge alleged discrimination on the basis of disability under the Americans with Disabilities Act (in addition to alleging discrimination on the basis of sex), the EEOC is no longer attempting to enforce the subpoena based on

(Continued on following page)

II

Title VII grants the EEOC broad power, within specified limits, to investigate potential violations of the statute. The agency's investigative authority is triggered by the filing of a charge alleging that an employer has engaged in employment practices made unlawful by the statute. A charge may be filed either by an EEOC Commissioner or, as in this case, by "a person claiming to be aggrieved." 42 U.S.C. § 2000e-5(b). The charge is not a formal pleading governed by the legal standards applicable to the filing of a complaint. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984). Its purpose is simply to "place the EEOC on notice that someone (either a party claiming to be aggrieved or a Commissioner) believes that an employer has violated the title." *Id.* A charge is valid if it contains "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices," although even a written statement "sufficiently precise to identify the parties, and to describe generally the action or practices complained of" will do. 29 C.F.R. § 1601.12(a)(3), (b).

Once the EEOC receives a charge, the statute states that the agency "shall make an investigation thereof." 42 U.S.C. § 2000e-5(b). The EEOC's investigative authority is limited, at least initially, to the unlawful employment practices specified in the charge.

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the allegations of disability discrimination. We therefore focus our analysis on the Title VII charge alone.

Shell Oil, 466 U.S. at 64. (If new facts come to light during an investigation, the EEOC may expand its scope beyond the practices specified in the original charge. *See EEOC v. General Elec. Co.*, 532 F.2d 359, 364-66 (9th Cir. 1976).) Unlike some federal agencies, which have "plenary authority to demand to see records relevant to matters within their jurisdiction," the EEOC's authority under Title VII is more constrained. *Shell Oil*, 466 U.S. at 64. The agency has the right to obtain evidence only if it relates to employment practices made unlawful under Title VII and "is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a).[2]

When an employer refuses to comply with the EEOC's requests for information, as occurred here, the EEOC may issue an administrative subpoena and bring an enforcement action to compel compliance. 42 U.S.C. § 2000e-9 (incorporating the provisions of 29 U.S.C. § 161). The scope of judicial review in such actions is narrow. A court determines only "(1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and

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[2] Section 2000e-8(a) provides: "In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."

material to the investigation." *EEOC v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc), *overruled on other grounds as recognized in Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994). If those conditions are met, the court must enforce the subpoena unless the objecting party shows that the subpoena is overbroad or that compliance would be unduly burdensome. *Id.* We review the district court's resolution of these issues de novo. *EEOC v. Federal Express Corp.*, 558 F.3d 842, 846 (9th Cir. 2009).[3]

III

With that background in mind, we turn to the specifics of the dispute before us. McLane does not contest that the EEOC has followed the proper procedural requirements. Nor can it seriously contest that the subpoena relates to a matter within the EEOC's

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[3] Why we review questions of relevance and undue burden de novo is unclear. In a similar but related context – issuance of a protective order restricting the scope of an administrative subpoena – we have said that review is for abuse of discretion. *See McLaughlin v. Service Employees Union, AFL-CIO, Local 280*, 880 F.2d 170, 174 (9th Cir. 1989). Other circuits also appear to review issues related to enforcement of administrative subpoenas for abuse of discretion. *See, e.g.*, *EEOC v. Kronos Inc.*, 620 F.3d 287, 295 (3d Cir. 2010); *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 649, 654 n.6 (7th Cir. 2002). Nonetheless, the de novo standard of review is now firmly entrenched in our case law. *See, e.g.*, *United States v. Golden Valley Electric Ass'n*, 689 F.3d 1108, 1111 (9th Cir. 2012); *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005, 1007 (9th Cir. 1996).

investigative authority, since Ochoa's charge alleges discrimination in employment on the basis of sex. *See* 42 U.S.C. § 2000e-2(a)(1). (Title VII defines discrimination on the basis of pregnancy as a form of sex discrimination. 42 U.S.C. § 2000e(k).) With respect to the test-taker pedigree information, McLane contests whether that information is "relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). With respect to the reasons for termination, McLane contends that producing such information would be unduly burdensome.

A

We begin with the district court's refusal to compel production of the pedigree information, which the court held is not relevant at this stage of the EEOC's investigation.

The relevancy limitation imposed by § 2000e-8(a) "is not especially constraining." *Shell Oil*, 466 U.S. at 68. The question is not whether the evidence sought would tend to *prove* a charge of unlawful discrimination. At the investigative stage, the EEOC is trying to determine only whether "reasonable cause" exists "to believe that the charge is true." 42 U.S.C. § 2000e-5(b). So the relevance standard in this context sweeps more broadly than it would at trial. It encompasses "virtually any material that might cast light on the allegations against the employer." *Shell Oil*, 466 U.S. at 68-69.

Under this standard, we think the pedigree information is relevant to the EEOC's investigation. Ochoa's charge alleges that McLane's use of the strength test discriminates on the basis of sex. To decide whether there is any truth to that allegation, the EEOC can of course speak to Ochoa about her experience with taking the test. But the EEOC also wants to contact other McLane employees and applicants for employment who have taken the test to learn more about their experiences. Speaking with those individuals might cast light on the allegations against McLane – whether positively or negatively. To take but one example, the EEOC might learn through such conversations that other female employees have been subjected to adverse employment actions after failing the test when similarly situated male employees have not. Or it might learn the opposite. Either way, the EEOC will be better able to assess whether use of the test has resulted in a "pattern or practice" of disparate treatment. To pursue that path, however, the EEOC first needs to learn the test takers' identities and contact information, which is enough to render the pedigree information relevant to the EEOC's investigation. The district court erred by refusing to enforce the subpoena's request for production of that information.

McLane raises a series of arguments resisting this conclusion, but all of them lack merit. First, McLane asserts that Ochoa's charge alleges only a *disparate impact* claim, not a pattern-or-practice *disparate treatment* claim. That assertion is wrong.

Ochoa's charge does not allege discrimination based on any particular legal theory, and it did not need to do so. *See EEOC v. Kronos Inc.*, 620 F.3d 287, 300 (3d Cir. 2010). A charge is valid if it is sufficiently precise "to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b). Ochoa's charge did that by describing McLane's practice of precluding employees who have taken maternity leave from returning to work unless they pass a strength test, which she could not do despite three attempts. Ochoa's charge is framed in terms general enough to support either a disparate impact or a disparate treatment theory. *See Kronos*, 620 F.3d at 300. As the Third Circuit put it in *Kronos*, "it is up to the EEOC, not [Ochoa], to investigate whether and under what legal theories discrimination might have occurred." *Id.*

Second, McLane contends that, given all of the other information it has produced, the EEOC cannot show that production of the pedigree information is "necessary" to complete its investigation. But the governing standard is not "necessity"; it is relevance. If the EEOC establishes that the evidence it seeks is relevant to the charge under investigation, we have no warrant to decide whether the EEOC could conduct the investigation just as well without it. The EEOC does not have to show a "particularized necessity of access, beyond a showing of mere relevance," to obtain evidence. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 188 (1990). Congress has not left it to employers accused of discrimination to decide what

evidence may be necessary for the EEOC to complete its investigation. *Id.* at 193.

For similar reasons, the district court erred when it held that pedigree information is irrelevant "at this stage" of the investigation. The court reasoned that the evidence McLane has already produced "will enable the E.E.O.C. to determine whether the [strength test] systematically discriminates on the basis of gender." The court suggested that if the EEOC's analysis of that evidence reveals systemic discrimination, the pedigree information might become relevant and obtaining that information might then be "necessary." The EEOC argues that the district court improperly required it to substantiate the allegation of systemic discrimination before it could obtain access to relevant evidence. We doubt that is what the district court meant, as the Supreme Court has made plain that courts may not condition enforcement of EEOC administrative subpoenas on a threshold evidentiary showing that the allegations under investigation have merit. *Shell Oil*, 466 U.S. at 71-72 & n.26. Rather, the district court appeared to conclude that the EEOC did not really need pedigree information to make a preliminary determination as to whether use of the strength test has resulted in systemic discrimination. As we have explained, however, that line of reasoning is invalid: The EEOC's need for the evidence – or lack thereof – simply does not factor into the relevance determination. Because the pedigree information meets the broad standard for relevance, the EEOC is entitled to obtain that information now. (McLane does not

contend that production of the information poses any kind of undue burden.)

Finally, McLane contends that the pedigree information is not relevant because Ochoa's charge alleges only a "neutrally applied" strength test, which by definition cannot give rise to disparate treatment, systemic or otherwise. McLane's argument misconstrues the charge. Ochoa alleges that McLane requires all employees returning from medical leave to take the strength test before they can return to work, but she does not allege that the test is neutrally *applied.* (She alleges just the opposite – that the test was discriminatorily applied as to her.) Even though McLane requires everyone to take the test, the test could still be applied in a discriminatory manner – if, for example, the company were to routinely excuse the failure of male employees to pass the test but grant no such exemptions to similarly situated female employees. The very purpose of the EEOC's investigation is to determine *whether* the test is being neutrally applied; the EEOC does not have to take McLane's word for it on that score. *See Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 296-99 (4th Cir. 2010).

One additional note is in order regarding the EEOC's request for social security numbers. The EEOC seeks that information so that it can accurately identify individual test takers in the data sets it has received from McLane. As explained above, other employees' experiences might cast light on the allegations against McLane, whether by substantiating

them or showing them to be unfounded. Information that helps the EEOC determine whom to contact to learn more about McLane's use of the test is therefore relevant to the investigation. McLane contends that the employee ID numbers should suffice for these purposes, but that is not McLane's call to make. Furthermore, McLane does not assert any undue burden associated with producing this information, nor could it, for the original data sets contain employee social security numbers. If anything, McLane has imposed an extra burden on itself by removing that information from the data sets before producing them to the EEOC.

McLane suggests in a footnote that it is simply attempting to protect its employees' privacy interests by withholding their social security numbers, but the Supreme Court has already rejected an analogous argument. *See University of Pennsylvania*, 493 U.S. at 192-93. Congress has struck the balance between granting the EEOC access to relevant evidence and protecting confidentiality interests by imposing strict limitations on the public disclosure of information produced during the course of an EEOC investigation. *Id.*; *see* 42 U.S.C. § 2000e-8(e). McLane's dissatisfaction with that balance does not entitle it to withhold information relevant to a charge of discrimination.

B

That leaves the second category of information in dispute: the reasons for termination. The district

court provided no explanation for refusing to require production of this information. It is clearly relevant to the EEOC's investigation; McLane does not argue otherwise. McLane nonetheless attempts to defend the district court's ruling on the ground that producing this information would pose an undue burden. McLane prevailed on this argument in the parallel subpoena enforcement action in the ADEA case, but the EEOC's request there was more onerous than the one at issue here. In the ADEA action, the EEOC sought information for employees whose dismissal was triggered by failure to pass the test, but McLane represented that its human resources database did not capture such "triggering" information and that it was not otherwise readily available. *McLane Co.*, 2012 WL 1132758, at *6. Here, the EEOC is not seeking such "triggering" information; it requests instead McLane's reasons for terminating employees who had previously taken the test, regardless of any linkage between the two. Because the issue raised in this action is not the same as the issue raised in the ADEA action, the EEOC is not precluded from litigating the undue burden issue here. *See Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000).

We do not think it would be prudent for us to address the undue burden issue in the first instance. We therefore vacate the district court's order denying enforcement of the subpoena's request for the reasons for termination, and remand so that the district court can rule on whether requiring McLane to produce

that information would in fact be unduly burdensome.

REVERSED in part, VACATED in part, and REMANDED.

M. SMITH, Circuit Judge, concurring:

I concur in the majority opinion. I write separately to discuss McLane's suggestion that it was justified in withholding its employees' Social Security Numbers to protect their privacy interests. The majority opinion rejects that argument, following *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). It bears noting, however, that *University of Pennsylvania* predates the rash of "data breach" incidents that plague a world interconnected by computers.

Of particular relevance is the United States government's dismal performance in protecting even its own employees' sensitive data. *See, e.g.*, Office of Personnel Management Cybersecurity Resource Center, Cybersecurity Incidents, "What Happened," https://www.opm.gov/cybersecurity/cybersecurity-incidents/#WhatHappened (detailing the discovery in June, 2015 of the theft from the Office of Personnel Management of 21.5 million Social Security Numbers, an undisclosed number of interview records, 5.6 million fingerprints, and an undisclosed number of usernames and passwords).

Thus, it may be that the EEOC's insistence here on obtaining Social Security Numbers and other information that could be used to steal an employee's identity will endanger the very employees it seeks to protect. While we, as a court, are not in a position in this case to weigh the concerns present in any particular data gathering and storage protocol, the EEOC would be well advised to consider these issues in the collection of data in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Equal Opportunity Employment Commission, Plaintiff, v. McLane Company, Inc., Defendant.	No. CV-12-02469-PHX-GMS **ORDER**

This is an action for enforcement of an administrative subpoena issued by the Equal Employment Opportunity Commission ("E.E.O.C.") to McLane Company, Inc. The E.E.O.C. has applied for an Order to Show Cause why the Administrative Subpoena Should Not be Enforced. (Doc. 1.) The E.E.O.C. has also moved to seal certain documents that it attached to its Reply. (Doc. 12.) McLane has moved to strike the exhibits filed under seal. (Doc. 22.) A hearing was held on November 16, 2012. The motions and hearing focused on requests for the results of the Industrial Physical Capacity Services Physical Capacity Exam ("IPCS PCE"), along with pedigree information and contact information for employees and applicants who had taken this exam.

BACKGROUND

This case involves McLane's use of the IPCS PCE for its employees. On August 8, 2008, the E.E.O.C.

sent a letter to Bobby Carlson, the President of McLane Sunwest, a subsidiary of McLane, stating that it was conducting an investigation of McLane under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626 (2006) ("ADEA").

The letter stated the investigation was being conducted pursuant to two charge numbers. The first, charge number 540-2008-01093, is a charge filed by a McLane Sunwest employee on January 7, 2008, alleging that she had been discriminated against based on her gender when she had not been re-hired after taking maternity leave because she had failed the IPCS PCE. (Doc. 2-1, Ex. A-1). The second, charge number 540-2010-01761, was initiated by the E.E.O.C. itself pursuant to its authority under the ADEA. By November 2010, the E.E.O.C. determined that it would pursue the two charges separately. This Court ruled on the ADEA subpoena earlier this year. *See E.E.O.C. v. McLane Co., Inc.*, No. CV-12-615-PHX-GMS 2012 WL 1132758 (D. Ariz. Apr. 4, 2012).

McLane is now faced with a subpoena based solely on charge number 540-200801093. (Doc. 2-1, Ex. A-12.) That charge, filed by McLane Sunwest employee Damiana Ochoa, alleged discrimination on the basis of sex and disability. (*Id.*, Ex. A-1.) She alleged that she failed the IPCS PCE three times after returning to work from maternity leave, and consequently believed she has "been discriminated against because of [her] sex, female (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended." (*Id.*) She also made the following claim:

"The Physical Capability Strength Test is given to all employees returning to work from a medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended." (*Id.*) Based on this charge, the E.E.O.C. requested a variety of information from McLane in relation to the administration of the IPCS PCE, including pedigree information, such as the name, gender, date of birth, social security number and contact information for every person who took the test, along with the reason the person took the test, the person's score on the test, and any adverse action that McLane took based on the person's performance on the test. (*Id.*, Ex. A-10.) The E.E.O.C. later informed McLane that it was broadening the scope of its investigation to all McLane facilities nationwide. (*Id.*)

McLane responded on January 14, 2011, and objected to the request as overly broad, unduly burdensome, and seeking information that is not relevant to the underlying charge. (*Id.*, Ex. A-11.) The letter noted differences between its grocery division, where Ochoa worked, and the food service division. The E.E.O.C. responded on February 15 by filing a subpoena that referenced Ochoa's charge and directed McLane to turn over the information. (*Id.*, Ex. A-12.) McLane petitioned to revoke the subpoena on February 22, 2011. (*Id.*, Ex. A-13.)

It appears that some information has been exchanged between the E.E.O.C. and McLane since that time and since the Court's Order in the ADEA case.

McLane has produced a database containing all individuals who have taken the IPCS PCE in any Grocery position nationwide. (Doc. 9 at 5.) This database does not include the names or social security numbers of those individuals, but does include their location, gender, job class, test date, reason for taking the test, level achieved, whether they met the minimum requirements, and other details relating to their test scores. (*Id.* at 5-6.) In response to the Court's April Order in the ADEA case, McLane is also in the process of compiling information as to whether an adverse action occurred within 90 days of the IPCS PCE, and has stated that it will produce the information to the E.E.O.C. as soon as the dataset is complete. (*Id.* at 6.)

The parties dispute the necessity of producing the following additional information for the individuals who have taken the test: name, social security number, date of application, date of hire, last known address, phone number, reason for termination (in connection with test results or not), and their medical or disability information. In addition, McLane has only produced information relative to its grocery division, not the food services division. The E.E.O.C. continues to seek for the aforementioned information, and affirmed its position at the hearing on November 16, 2012.

DISCUSSION

I. LEGAL STANDARD

A district court's review of an administrative subpoena is "strictly limited." *E.E.O.C. v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1430 (9th Cir. 1983), *abrogated on other grounds by Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *as recognized by Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994)). Raising a defense to the merits of the charge or investigation does not defeat a subpoena. *E.E.O.C. v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001). A court reviewing the validity of an administrative subpoena instead conducts a three-part inquiry, asking: "(1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." *Children's Hosp.*, 719 F.2d at 1428. The administrative agency shoulders the burden of demonstrating that these three prongs are met. *Id.*

If the agency demonstrates that it has authority to investigate, the procedural requirements have been followed, and the evidence is relevant and material to the investigation, the burden shifts to the respondent, who must show that a subpoena is "overbroad or unduly burdensome" for a court to quash it. *E.E.O.C. v. Quad Graphics*, 63 F.3d 642, 648 (7th Cir. 1995). The question of whether an administrative subpoena is overbroad may be answered by asking whether "the

demand for information is too indefinite or has been made for an illegitimate purpose." *University of Penn. v. EEOC*, 493 U.S. 182 (1990). A subpoena may be unduly burdensome if either 1) "the cost of gathering this information is unduly burdensome in the light of the company's normal operating costs," or 2) "gathering the information would threaten [a respondent's] normal business operations." *E.E.O.C. v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986).

II. ANALYSIS

The E.E.O.C. and McLane dispute the first and third prongs of the validity inquiry. McLane asserts that the E.E.O.C. lacks authority to request information regarding disabilities based on the subpoena in question here. It also argues that the additional "pedigree" information sought for both the gender and ADA claim is not relevant at the moment. Finally, McLane complains of the breadth of the E.E.O.C.'s inquiry and asserts that production of all the requested information would create a significant burden.

A. Validity of Subpoena

The subpoena is valid if the E.E.O.C. can show that Congress has authorized it to issue such a subpoena, the subpoena was issued in a procedurally proper way, and the information requested in the subpoena is relevant to the agency's investigation. *Children's Hosp.*, 719 F.2d at 1428. The district court

plays a "strictly limited" role at this point. *Id.* at 1430.

1. Jurisdiction

Investigations conducted by the E.E.O.C. under Title VII or the ADA are "triggered by the filing of a charge of discrimination." *E.E.O.C. v. Federal Exp. Corp.*, 558 F.3d 842, 849 (9th Cir. 2009). The procedure is described in 42 U.S.C. § 2000e-5(b) (2006). The charge can be filed "by or on behalf of a person claiming to be aggrieved, or by a member of the Commission." *Id.* There are thus three categories of charges that give rise to an E.E.O.C. investigation: those brought by an aggrieved person herself, those brought by someone on behalf of an aggrieved person, and those brought by a member of the Commission on behalf of an aggrieved person. The common statutory requirement, though, is an aggrieved person. *See Federal Exp.*, 558 F.2d at 849 ("A charge may be filed by an individual who alleges that he was discriminated against or by a Commissioner of the EEOC."). It is when an aggrieved person has a charge that the E.E.O.C.'s broad investigatory powers are triggered. And the subpoena seeking information relating to potential violations of Title VII and the ADA must reference "a person claiming to be aggrieved."

The investigative powers, broad as they are, derive from the charge. "[T]he EEOC's power of investigation is anchored to the charge of discrimination, and courts must be careful not to construe the charge and

relevance requirements so broadly as to confer 'unconstrained investigative authority' upon the EEOC." *E.E.O.C. v. Kronos Inc.*, 620 F.3d 287, 297 (3d Cir. 2010). One charge appears on the subpoena in question, and the Court confines its "strictly limited" analysis to the Ochoa charge. She first alleges that she suffered gender discrimination because of the administration of the IPCS PCE. (Doc. 2-1, Ex. A-1.) There is little dispute that Ochoa is an "aggrieved party" within the meaning of the statute and that the charge gives the E.E.O.C. jurisdiction to investigate the IPCS PCE discriminates on the basis of gender.

But Ochoa's second charge – that she believes the test discriminates on the basis of disability – does not give the E.E.O.C. jurisdiction to investigate ADA violations. The statute requires that a charge be tied to a specific aggrieved party. *See* 42 U.S.C. § 2000e-5(b) (charges to be filed "by or on behalf of a person claiming to be aggrieved"). The charge does not mention any instance of discrimination on the basis of disability. Ochoa does not claim she is disabled. The parties agreed at the hearing that pregnancy is not typically a disability within the meaning of the ADA, and that Ochoa does not appear to have had the sort of atypical pregnancy that would trigger the ADA. In addition, Ochoa does not purport to bring the ADA charge for another aggrieved party. She instead makes a blanket assertion that the test violates the ADA. Such a charge does not comport with the statute. To ignore the plain language of the statute and to allow the EEOC to investigate a generalized charge of

discrimination that is untethered to any aggrieved person would invite the oft-cited "fishing expedition," *Peters v. U.S.*, 853 F.2d 692, 699700 (9th Cir. 1988), to become a full-blown harvest operation. If anyone could file a charge – devoid of a specific aggrieved party – that asserts that such-and-such policy discriminates on any number of bases, the E.E.O.C. would have close to unlimited jurisdiction, and it would make virtually limitless any investigation the EEOC wished to undertake.

The E.E.O.C. responds to the absence of an ADA-aggrieved party in the Ochoa charge by attaching three documents to its Reply. Two are charges that contain ADA grievances, and one is a declaration from a McLane employee who asserts that she was discriminated based on her diagnosis of cancer. (Docs 13-1, 13-2, 13-3.) Yet this is an Application for an Order to Show Cause Why an Administrative Subpoena Should Not be Enforced in the Ochoa investigation, not any of the three investigations that are attached to the Application. (Doc. 1.) "The EEOC is entitled only to evidence that is 'relevant to the charge[s] under investigation," and where there is only one charge listed on the subpoena, it is that charge that determines jurisdiction to enforce a subpoena. *E.E.O.C. v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1157 (10th Cir. 2012) ("The subpoena focuses on [two] charges. Nowhere in the document is there any reference to any other charge – by way of a reference to any other charging party, an additional charge number, or anything else – that might indicate

that an additional charge is at issue."). The E.E.O.C. might have withdrawn the initial subpoena and updated it to include the other charges, but it chose to rely solely on the Ochoa charge. It is true that "[o]nce the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation *of the charge*." *Kronos*, 620 F.3d at 297 (emphasis added). But the additional claims must arise in the course of a valid investigation of a valid charge. *See Gen. Tel. Co. of the N.W., Inc. v. EEOC*, 446 U.S. 318, 331 (1980) ("Any violations that the EEOC ascertains in the course *of a reasonable investigation of the charging party's complaint* are actionable.") (emphasis added). The Ochoa charge did not give the E.E.O.C. authority to investigate ADA violations. Nor has the E.E.O.C. claimed that it discovered these ADA violations while investigating Ochoa's gender discrimination claim. Consequently, the Court will not consider the additional charges attached to the E.E.O.C.'s Reply.

The subpoena the E.E.O.C. seeks to enforce is directly solely to the matter of "Ochoa v. McLane Sunwest." That matter involves two charges, only one of which involves an actual aggrieved party – a charge of gender discrimination. Therefore, the E.E.O.C. has jurisdiction to investigate the Title VII issue. The E.E.O.C.'s application to enforce the portions of the subpoena that require production of information relating to disability is denied.

2. Relevance

McLane also objects on relevance grounds to the scope of information requested in the subpoena for the gender discrimination claim. At this point, McLane has provided (or will shortly provide) data on employee test scores, location, gender, job class, test date, reason for taking the test, level achieved, whether they met the minimum requirements, and other details relating to their test scores for the grocery division. (Doc. 9 at 5-6.) The E.E.O.C. has asked for pedigree information for each individual that has taken the test: name, address, social security number, and so forth. The relevance limitation "is not especially constraining," *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 68 (1984), but it is not a rubber-stamp procedure, see *EEOC v. Harvey L. Walner & Assoc.*, 91 F.3d 963, 968 (7th Cir. 1996) (requiring that there must be "a reasonable nexus between the initial charge and the subsequent allegations in the complaint").

Again, the charge referenced in the subpoena defines the scope of the E.E.O.C.'s investigatory power. *See EEOC v. United Parcel Serv.*,94 F.3d 314, 318 (7th Cir. 1996) (recognizing that an investigation must be "reasonably related in scope to the allegations of the underlying charge"). The Ochoa charge alleges that the IPCS PCE examination systematically discriminates on the basis of gender, as evidenced by her three unsuccessful attempts to pass. Judging by the E.E.O.C.'s filings and the discussion at the hearing, the primary motivation for obtaining the pedigree information related to the ADA charge. That

information is not relevant at this stage to a determination of whether the IPCS PCE systematically discriminates on the basis of gender. The Court's statements in the earlier ADEA matter apply with equal force here:

> The E.E.O.C.'s independent investigatory power is broad, but as it has defined its investigation, the genders, names, contact information, and social security numbers of individual employees are simply not relevant – an individual's name, or even an interview he or she could provide if contacted, simply could not "shed light on" whether the ICPS [sic] PCE represents a tool of [gender] discrimination in the aggregate. The E.E.O.C. has provided nothing to the Court to allay the concerns raised by McLane that such data has been requested as a means of trolling for possible complainants. . . . 'An administrative subpoena may not be so broad so as to be in the nature of a "fishing expedition."

McLane, 2012 WL 1132758 at *5 (internal citations omitted).

McLane has provided or will soon provide the information, without individually identifying pedigree information, requested by the E.E.O.C. and ordered by this Court in the ADEA matter. The addition of the gender variable will enable the E.E.O.C. to determine whether the IPCS PCE systematically discriminates on the basis of gender. The results may

indicate that it does. At that point, pedigree information may become relevant to an investigation and the E.E.O.C. may find it necessary to seek such information. Consequently, the E.E.O.C.'s application to enforce the subpoena's directive to provide pedigree information for all those who have taken the IPCS PCE is denied.[1]

B. Breadth of Subpoena

McLane objects to the breadth of the subpoena, which it claims is addressed to the entirety of the McLane corporate family. The briefing has clarified, however, that the E.E.O.C. is only seeking the information from McLane's nationwide grocery operations, not the food service division. (Doc. 15 at 8.) McLane has stated in its Response that it has provided a nationwide database for grocery applications and employees, and it appears this database is what McLane is updating with the adverse employment decision data. (Doc. 9 at 5-6.) Given the allegation in the Ochoa charge that the IPCS PCE itself discriminates on the basis of gender and that test is administered nationwide for the grocery division, nationwide

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[1] The E.E.O.C. states in its Reply that "the statistical evidence indicates McLane's application of the PCE *violates the four-fifths rule* with respect to gender." (Doc. 15 at 7.) Given that McLane has not yet produce [sic] all of the requested information, most importantly whether an adverse employment decision occurred within 90 days of taking the test, the Court does not see how such a conclusion could be reached at this time.

data is necessary. To the extent McLane objects to providing nationwide data on overbreadth grounds, its objections are unsuccessful. McLane must produce the following information for its Grocery applicants and employees, along with a unique identification number: (1) sex; (2) test score; (3) date of the test; (4) position applied for or reason the test was taken; (5) required score for that position; and (6) whether applicant or employee suffered adverse employment action within 90 days of test result. The remaining information is not relevant to the investigation of potential gender discrimination in the IPCS PCE at this juncture.

CONCLUSION

The E.E.O.C. has received a broad grant of power from Congress to investigate allegations of Title VII and ADA violations. Yet that investigative authority derives from the filing of specific charges by specific individuals. The subpoena issued by the E.E.O.C. is governed by the charges it references. The one charge referenced here – the Ochoa charge – alleges that the IPCS PCE discriminates on the basis of gender and disability. Only the gender charge is tied to a specific grievance, however. The ADA charge fails to comply with the statute and consequently cannot trigger an E.E.O.C. investigation into whether the IPCS PCE discriminates on the basis of disability. McLane has stated its willingness to provide nationwide information on the administration of the IPCS PCE that would allow the E.E.O.C. to determine whether the

test discriminates on the basis of gender. Specific pedigree information does not, at this stage, illuminate that inquiry. Consequently, the subpoena at issue here is enforceable only to the extent it requires the information described in this order. The remaining portions fall outside the E.E.O.C.'s broad authority to investigate allegations of discrimination.

IT IS THEREFORE ORDERED:

1. The E.E.O.C.'s Motion to Seal Document (Doc. 12) is **GRANTED**. The Clerk of Court is directed to file under seal the lodged proposed exhibits (Doc. 13).

2. McLane's Motion to Strike Exhibits (Doc. 22) is **denied as moot**.

3. Regarding those people who applied to McLane and took the IPCS PCE, McLane must provide the E.E.O.C. one of the following: **either**

    a. Information on applicants who took the IPCS PCE including:

        i. The applicant's gender at the time the test was taken

        ii. The applicant's score on the test

        iii. The date the applicant took the test

        iv. The position for which the applicant applied

        v. The score required for passing the test for the position in question

vi. Whether the applicant suffered adverse employment action within 90 days of test result; **or**

b. Access to McLane's human resources records sufficient for the E.E.O.C. to obtain the data in item 3(a) above.

4. McLane must provide the E.E.O.C. information on employees who took the IPCS PCE test, including

a. The employee's gender at the time the test was taken

b. The employee's score on the test

c. The date the employee took the test

d. The reason the employee took the test

e. The score required for passing the test for the reason the employee took the test

f. Whether the employee suffered adverse employment action within 90 days of test result.

5. The Clerk of Court is directed to terminate this action.

Dated this 19th day of November, 2012.

/s/ G. Murray Snow
G. Murray Snow
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant, v. MCLANE COMPANY, INC., Defendant-Appellee.	No. 13-15126 D.C. No. 2:12-cv-02469-GMS District of Arizona, Phoenix ORDER (Filed Jan. 22, 2016)

Before: WALLACE, M. SMITH, and WATFORD, Circuit Judges.

Judge Smith and Judge Watford vote to deny the petition for rehearing en banc, and Judge Wallace so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc, filed December 11, 2015, is DENIED.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JUL - 6 2016
OFFICE OF THE CLERK

No. 15-1248

In the Supreme Court of the United States

MCLANE COMPANY, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals was correct to review de novo the district court's decision concerning the enforceability of an administrative subpoena issued by the Equal Employment Opportunity Commission for certain employment records, when the enforceability decision turned on a question of law.

2. Whether the court of appeals correctly applied the standard of relevancy set forth in *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984), when it found certain employee data relevant to an EEOC investigation.

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In the Supreme Court of the United States

No. 15-1248

MCLANE COMPANY, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 804 F.3d 1051. The opinion and order of the district court (Pet. App. 18-33) is not published in the *Federal Supplement* but is available at 2012 WL 5868959.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2015. A petition for rehearing was denied on January 22, 2016 (Pet. App. 34). The petition for a writ of certiorari was filed on April 4, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII), provides that once the Equal Employment Opportunity Commission (EEOC

or Commission) receives a charge of discrimination, the agency "shall make an investigation thereof." 42 U.S.C. 2000e-5(b). "In connection with any investigation of a charge" of discrimination filed with the EEOC, "the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter" so long as the evidence "is relevant to the charge under investigation." 42 U.S.C. 2000e-8(a). This relevance standard has been "generously construed," and "afford[s] the Commission access to virtually any material that might cast light on the allegations against the employer." *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 68-69 (1984).

When an employer refuses to provide the Commission with information it seeks as part of an investigation, the EEOC may issue an administrative subpoena and request that a court enforce compliance with the subpoena. 42 U.S.C. 2009e-9 (incorporating 29 U.S.C. 161); see *Shell Oil*, 466 U.S. at 63.

2. a. In January 2008, Damiana Ochoa filed a charge with the EEOC alleging that petitioner, a national supply services company, had engaged in sex discrimination based on pregnancy, in violation of Title VII. Pet. App. 2.

Ochoa filed her charge after she was fired by petitioner. Ochoa had taken a maternity leave. When she sought to return to her position in the grocery division of one of petitioner's Arizona subsidiaries, Ochoa was told that she would first be required to pass a physical strength test. Ochoa alleged in her charge that petitioner requires such strength tests of "all employees

returning to work from a medical leave and all new hires, regardless of job position." She stated in her charge that after she was unsuccessful in three attempts to pass the strength test, petitioner fired her. Pet. App. 19-20; see *id.* at 2-3.

The Commission began an investigation of the Arizona subsidiary where Ochoa worked and—after petitioner acknowledged that it employed strength tests for all employees nationwide returning to positions it classified as physically demanding—expanded the investigation to include all of petitioner's grocery-division facilities. Pet. App. 3; see C.A. E.R. 60-61, 100.[1] As part of its investigation, the Commission requested data regarding employees who had been required to take strength tests and petitioner's employment decisions concerning those employees. Petitioner ultimately complied with the Commission's requests for the gender and job class of each employee that petitioner had required to take the strength test; the reasons petitioner had required the tests; and whether the employees had passed or failed the tests. *Ibid.*

Petitioner refused, however, to disclose so-called "pedigree information" regarding the employees described in that data—such as names, addresses, and social security numbers. C.A. E.R. 27-28, 60-67, 70.

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[1] Ochoa also alleged that petitioner's use of a strength test violates the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* C.A. E.R. 46. After the EEOC sought to enforce part of its subpoena seeking information related to disability discrimination, however, the district court concluded that since Ochoa neither claimed to be disabled nor claimed to have brought her charge on behalf of a disabled individual, the EEOC lacked jurisdiction to investigate Ochoa's allegation of disability discrimination. *Id.* at 5-7. The EEOC did not appeal that determination.

Petitioner also declined to provide information about why it had terminated the employees who were dismissed after taking strength tests. Pet. App. 4; C.A. E.R. 82-83.

The Commission issued a subpoena seeking the withheld information. Pet. App. 4. It noted before the district court that the names and social security numbers were part of petitioner's human resources and testing records, so that production of the information did not impose an additional burden on petitioner. C.A. E.R. 133.

b. The district court denied enforcement of the Commission's subpoena in part and granted the request in part. Pet. App. 18-33. As relevant here, the district court declined to enforce the subpoena as to pedigree information, writing that the pedigree information was "not relevant at this stage to a determination of whether the [test] systematically discriminates on the basis of gender." *Id.* at 29. The court reasoned that the Commission could preliminarily establish whether petitioner's use of the strength test discriminated based on statistical data, writing that "[t]he addition of the gender variable" to petitioner's testing data "will enable the E.E.O.C. to determine whether the [strength test used by petitioner] systematically discriminates on the basis of gender." *Ibid.* If statistical analysis indicates "that it does" discriminate, the district court wrote, "[a]t that point, pedigree information may become relevant to an investigation and the [Commission] may find it necessary to seek such information." *Id.* at 29-30.

The district court also did not grant enforcement of the portion of the Commission's subpoena seeking disclosure of the reasons for the terminations of the em-

ployees who were fired after taking strength tests. Pet. App. 32-33. The court did not, however, directly address the parties' arguments concerning the EEOC's request for that information.[2]

c. The court of appeals reversed the district court's decision in part, vacated the decision in part, and remanded for further proceedings. Pet. App. 1-17.

The court of appeals first concluded that the district court had erred in declining to enforce the EEOC's subpoena for pedigree information on the theory that the identity of the individuals whom petitioner required to take strength tests was not relevant to EEOC's investigation of whether petitioner's use of the strength test constituted gender discrimination. The court of appeals noted that "Title VII grants the EEOC broad power, within specified limits, to investigate potential violations of the statute." Pet. App. 6. In considering whether to enforce an EEOC subpoena, the court explained, a reviewing court's authority is limited to determining "(1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." *Id.* at 7-8 (quoting *EEOC* v. *Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc), overruled on other grounds as recognized in

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[2] The district court granted enforcement of the subpoena insofar as it required petitioner to disclose the gender of each test taker; the date the test was given; the score the test taker received; the position for which the test was taken; the passing score for the position in question, and whether any adverse employment action was taken within 90 days of an employee's taking the test. Pet. App. 4-5.

Prudential Ins. Co. v. *Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994), cert. denied, 516 U.S. 812 (1995)). If those conditions are met, it wrote, "the court must enforce the subpoena unless the objecting party shows that the subpoena is overbroad or that compliance would be unduly burdensome." *Id.* at 8 (citation omitted). The court stated that it reviews "the district court's resolution of these issues de novo." *Ibid.* In a footnote, the court observed that the reason it applied de novo review was "unclear" and that "[o]ther circuits * * * appear to review issues related to enforcement of administrative subpoenas for abuse of discretion." *Id.* at 8 n.3.

The court of appeals next concluded that the district court had erred in declining to enforce the EEOC's subpoena for pedigree information of test takers on the theory that the information was not relevant to the EEOC's investigation. It observed that in *Shell Oil*, this Court had explained that the standard of relevancy for administrative subpoenas was "not especially constraining," and encompasses "virtually any material that might cast light on the allegations against the employer." Pet. App. 9 (quoting *Shell Oil*, 466 U.S. at 68-69).

Applying that standard, the court of appeals concluded that "pedigree information is relevant to the EEOC's investigation." Pet. App. 10. The court explained that "Ochoa's charge alleges that [petitioner's] use of the strength test discriminates on the basis of sex," and that the EEOC wished to investigate the veracity of that charge by "contact[ing] other [of petitioner's] employees and applicants for employment who have taken the test" in order "to learn more about their experiences." *Ibid.* "Speaking with those

individuals," the court wrote "might cast light on the allegations against McLane—whether positively or negatively." *Ibid.* For example, the court explained, speaking with test takers would shed light on whether the strength tests were part of a pattern or practice of discrimination, because

> the EEOC might learn through such conversations that other female employees have been subjected to adverse employment actions after failing the test when similarly situated male employees have not. Or it might learn the opposite. Either way, the EEOC will be better able to assess whether use of the test has resulted in a "pattern or practice" of disparate treatment.

Ibid.

The court of appeals explained that the contrary conclusions of petitioner and the district court rested on misapprehensions of statutory standards or of Ochoa's charge. The court first rejected petitioner's contention that the pedigree information was irrelevant because Ochoa's charge "alleges a disparate impact claim, not a pattern-or-practice claim." Pet. App. 10 (emphasis omitted). This description, the court explained, was "wrong" because Ochoa's charged alleged sex discrimination through use of the test, but "does not allege discrimination based on any particular legal theory, and it did not need to do so." *Id.* at 10-11 (citing *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 300 (3d Cir. 2010)).

The court of appeals next rejected petitioner's contention that pedigree information concerning employees that petitioner required to take strength tests was not "relevant" to the charge of discrimination because "given all of the other information [petitioner] has

produced, the EEOC cannot show that production of the pedigree information is 'necessary' to complete its investigation." Pet. App. 11. The court observed that "the governing standard is not 'necessity,' it is relevance," and, citing *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 188 (1990), noted that "[t]he EEOC does not have to show a 'particularized necessity of access, beyond a showing of mere relevance,' to obtain evidence." Pet. App. 11.

The court of appeals then rejected the district court's reasoning regarding relevance as resting on a misunderstanding of the statutory relevance standard. The district court, it noted, "appeared to conclude that the EEOC did not really need pedigree information to make a preliminary determination as to whether the use of the strength test has resulted in systemic discrimination." Pet. App. 12. This was error, the court of appeals explained, because relevance—rather than necessity—was the standard. *Ibid.* Thus, it wrote, "[t]he EEOC's need for evidence—or lack thereof—simply does not factor into the relevance discrimination." *Ibid.*

Finally, the court of appeals rejected petitioner's contention that pedigree information was irrelevant because "Ochoa's charge alleges only a 'neutrally applied' strength test, which by definition cannot give rise to disparate treatment, systemic or otherwise." Pet. App. 13. That contention, the court explained, "misconstrues the charge." *Ibid.* The court observed that Ochoa had alleged that petitioner required all employees returning from medical leave "to take the strength test before they can return to work," but that—far from alleging that "the test is neutrally *applied*"—Ochoa had alleged "that the test was dis-

criminatorily applied as to her." *Ibid.* The court added that "[t]he very purpose of the EEOC's investigation is to determine *whether* the test is being neutrally applied; the EEOC does not have to take [petitioner's] word for it on that score." *Ibid.* (citing *Merritt* v. *Old Dominion Freight Line, Inc.*, 601 F.3d 289, 296-299 (4th Cir. 2010)).

The court of appeals also observed that petitioner had not contended that production of social security numbers would impose any "undue burden." Pet. App. 14. The court added that while petitioner had suggested in a footnote that it was "attempting to protect its employees' privacy interests by withholding their social security numbers," this was not a valid ground for withholding the information from the EEOC under the statute. *Ibid.* (citing 42 U.S.C. 2000e-8(e); *University of Pa.*, 493 U.S. at 192-193).

As to the second class of information in dispute on appeal—petitioner's reasons for terminating individuals who had taken strength tests—the court of appeals "vacate[d] the district court's order denying enforcement" of the relevant portion of the subpoena, and remanded the case for further proceedings. Pet. App. 15. The court noted that "[t]he district court provided no explanation for refusing to require production of this information." *Id.* at 14-15. It noted that there was no dispute that the reasons for termination were relevant to the EEOC's investigation, and that the parties had disagreed only over whether "production of this information would pose an undue burden." *Id.* at 15. Rather than address that question in the first instance, the court remanded the case "so that the district court can rule on whether requiring [petition-

er] to produce that information would in fact be unduly burdensome." *Id.* at 15-16.[3]

ARGUMENT

Petitioner contends (Pet. 15-20) that the court of appeals erred in applying de novo review to the district court's decision declining to enforce an administrative subpoena. It further contends (Pet. 21-27) that the court of appeals was incorrect in finding certain pedigree information relevant to the EEOC investigation in this case. These arguments lack merit. Because the court of appeals found legal error in the district court's decision, its de novo review was consistent with decisions of this Court and with the approaches of other courts in subpoena enforcement actions. Moreover, petitioner's failure to preserve any challenge to the standard of review before the panel counsels against granting a writ of certiorari to review that challenge. The court of appeals' fact-specific determination of relevance was also correct and does not conflict with the decision of any other court of appeals. Further review is unwarranted.

1. a. The court of appeals correctly applied a de novo standard in rejecting the district court's grounds for declining to enforce EEOC's administrative subpoena for pedigree information concerning certain of petitioner's employees. Courts of appeals consistently apply de novo review to district courts' resolution of

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[3] In a concurrence, Judge Milan D. Smith emphasized the importance of safeguarding sensitive identity data, such as social security numbers, and stated that while "we, as a court, are not in a position in this case to weigh the concerns present in any particular data gathering and storage protocol, the EEOC would be well advised to consider these issues in the collection of data in this case." Pet. App. 16-17.

legal questions that are part of subpoena enforcement decisions—despite some variation in the standards of review applied to other aspects of those courts' enforcement decisions. The Ninth Circuit reviews district courts' orders concerning enforcement of EEOC administrative subpoenas de novo. Pet. App. 8 (citing *EEOC* v. *Federal Express Corp.*, 558 F.3d 842, 846 (9th Cir.), cert. denied, 558 U.S. 1011 (2009)). Most other courts of appeals, in contrast, review decisions concerning enforcement of administrative subpoenas for abuse of discretion. *EEOC* v. *Kronos, Inc.*, 620 F.3d 287, 295-296 (3d Cir. 2010) (enforcement decisions generally); *EEOC* v. *Randstad*, 685 F.3d 433, 442 (4th Cir. 2012) (same); *United States* v. *Chevron U.S.A., Inc.*, 186 F.3d 644, 647 (5th Cir. 1999) (same); *EEOC* v. *Quad/Graphics, Inc.*, 63 F.3d 642, 644-645 & n.1 (7th Cir. 1995) (same); *United States EEOC* v. *Technocrest Sys., Inc.*, 448 F.3d 1035, 1038 (8th Cir. 2006) (enforcement decisions and relevancy determinations); *FTC* v. *Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 148 (D.C. Cir. 2015) (enforcement decisions generally), cert. denied, 136 S. Ct. 925 (2016). The Second Circuit has stated that subpoena enforcement decisions are reviewed for abuse of discretion, *Ratliff* v. *Davis Polk & Wardwell*, 354 F.3d 165, 168 (2003), but has treated relevancy determinations as decisions of fact reviewable for clear error, *EEOC* v. *United Parcel Serv., Inc.*, 587 F.3d 136, 137 (2009) (per curiam). Finally, the Eleventh Circuit has characterized "[t]he 'relevance' of documents in an administrative proceeding" as "a mixed question of law and fact." *EEOC* v. *Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 760 (2014) (per curiam).

Under any of these frameworks, a district court's interpretation of the legal standard of relevancy is subject to de novo review. A district court "by definition abuses its discretion when it makes an error of law." *Koon* v. *United States*, 518 U.S. 81, 100 (1996) (citing *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990)); see *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 n.2 (2014) (same). Accordingly, courts of appeals applying an abuse-of-discretion standard in subpoena enforcement cases have stated that de novo review applies when district courts misunderstand the applicable standard. *Boehringer Ingelheim Pharm.*, 778 F.3d at 148 ("A district court necessarily abuses its discretion if it applies the incorrect legal standard, a question that is reviewed de novo.") (emphasis omitted); *Kronos*, 620 F.3d at 295-296 (stating that a district court commits abuse of discretion in a subpoena enforcement action "when 'the district court's decision rests upon * * * an errant conclusion of law'") (citations omitted); *Quad/Graphics*, 63 F.3d at 645 n.1 (explaining that "enforcement decisions hinging upon a district court's legal understanding are reviewed in plenary fashion"); *Randstad*, 685 F.3d at 448 ("The district court's application of an unduly strict standard of relevance amounted to legal error, leading to an abuse of discretion."). Similarly, the Second Circuit has stated that the legal errors in subpoena enforcement proceedings are reviewed de novo, *Ratliff*, 354 F.3d at 168 (citing *Koon*, 518 U.S. at 100; *In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 19, 2002*, 318 F.3d 379, 383 (2d Cir. 2003)), and found reversible error when a

"district court applied too restrictive a standard of relevance," *United Parcel Serv.*, 587 F.3d at 137.[4]

Under all these frameworks, the court of appeals properly applied de novo review in rejecting the district court's determination that pedigree information was not relevant to the EEOC investigation in this case. The court of appeals understood the district court to have misconstrued the applicable legal test—declining to enforce the EEOC's subpoena on the "invalid" ground that "the EEOC did not really need pedigree information to make a preliminary determination as to whether use of the strength test has resulted in systemic discrimination." Pet. App. 12. The showing of need that the district court appeared to require, the court of appeals explained, "simply does not factor into the relevance determination." *Ibid.* Since the appropriate legal standard for subpoena enforcement is a question of law that is reviewed de novo in any court, the court of appeals' use of de novo review to reject the district court's construction of the

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[4] Moreover, when courts of appeal that utilize a deferential standard of review in subpoena enforcement actions have found that a district court's conclusion in an enforcement proceeding rested on legal error, they have addressed the underlying merits of whether enforcement of the subpoena was warranted without any deference. *E.g.*, *Randstad*, 685 F.3d at 448 (rejecting district court's construction of relevance standard as erroneous and "[a]pplying the correct standard, with deference to the EEOC's assessment of relevance," to "conclude that all of the EEOC's requested materials fall within the broad definition of relevance applicable to EEOC administrative subpoenas"); *Kronos*, 620 F.3d at 299; *United Parcel Serv., Inc.*, 587 F.3d at 139-140; see *EEOC* v. *United Air Lines*, 287 F.3d 643, 654 n.6 (7th Cir. 2002) (conducting review of relevancy where district court had failed to conduct relevancy analysis).

applicable standard was correct under the approach of any circuit.

b. In any event, the question whether a de novo standard of review applies to district courts' subpoena enforcement decisions is not one that currently warrants this Court's review. As petitioner acknowledges, only the Ninth Circuit applies a de novo standard of review to district courts' ultimate enforcement decisions. The decision below, however, raises doubt as to whether the Ninth Circuit would adhere to that standard if asked to reconsider it in an appropriate case. Before the panel both parties expressly agreed that a de novo standard of review applied, Resp. C.A. Br. 21; Gov't C.A. Br. 27 n.6, and the panel applied that standard. However, the panel expressly noted that it was not clear why it reviewed subpoena enforcement decisions de novo, and it observed that its approach differed from that of other courts of appeals. Pet. App. 8 & n.3. While petitioner subsequently asked the court to revisit that standard by filing a petition for rehearing en banc, the petition was not an appropriate vehicle for such reconsideration because under circuit precedent, the court of appeals does not "consider issues that a party raises for the first time in a petition for rehearing." *United States* v. *Mageno*, 786 F.3d 768, 775 (9th Cir. 2015) (quoting *Varney* v. *Secretary of Health & Human Servs.*, 859 F.2d 1396, 1397 (9th Cir. 1988)); see *Boardman* v. *Estelle*, 957 F.2d 1523, 1535 (9th Cir.), cert. denied, 506 U.S. 904 (1992). This Court's intervention to consider a standard that the court of appeals has questioned would be premature before the court of appeals itself has had an appropriate opportunity to reconsider that standard.

c. Petitioner's failure to preserve its standard of review argument before the panel is an independent reason why further review is not warranted in this case. This Court's general rule is that it will not decide an issue raised by a party that was neither presented nor decided below. See, *e.g.*, *United States* v. *Jones*, 132 S. Ct. 945, 954 (2012); *Rent-A-Center W., Inc.* v. *Jackson*, 561 U.S. 63, 75-76 (2010); *United States* v. *Galletti*, 541 U.S. 114, 120 n.2 (2004); *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). Litigants can and do preserve arguments for en banc or Supreme Court review in their appellate briefing, notwithstanding contrary circuit precedent on a question at issue. See, *e.g.*, *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007) (noting petitioner had devoted "a few pages" to issue in court of appeals briefing, despite binding contrary circuit precedent). Since this Court is a "court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), petitioner's failure to raise its claims before the panel—and the corresponding lack of development concerning the standard-of-review question in the court below—renders this case a poor vehicle for further consideration.

2. Review is also unwarranted of petitioner's contention (Pet. 21-27) that the court of appeals erred in concluding that the pedigree information sought by the EEOC was relevant to the EEOC's investigation of Ochoa's charge. There was no error in the court's relevancy determination. The court correctly set forth the applicable legal standard of *Shell Oil*. Pet. App. 9 (quoting *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 68-69 (1984)). It then concluded that "[u]nder this standard, * * * the pedigree information is relevant to the

EEOC's investigation" of Ochoa's charge that petitioner's "use of the strength test discriminates on the basis of sex." *Id.* at 10. The court explained that, "[t]o take but one example," the EEOC "will be better able to assess whether use of the test has resulted in a 'pattern or practice' of disparate treatment" by speaking with "other [of petitioner's] employees and applicants for employment who have taken the test." *Ibid.*

Petitioner does not (and could not) assert any error in the court of appeals' articulation of the applicable legal rule. Instead, petitioner suggests (Pet. 22-23) that the court of appeals misapplied the standard developed in *Shell Oil* because any connection between the pedigree materials sought by the EEOC and the EEOC's investigation of the Ochoa charge is speculative. But petitioner simply fails to address the court of appeals' explanation of why the evidence sought would in fact make the EEOC "better able to assess" Ochoa's charge regarding discriminatory use of strength tests. See Pet. App. 10. In any event, the question whether a court correctly applied a legal rule to particular facts does not ordinarily warrant this Court's review. Sup. Ct. R. 10.

Petitioner asserts (Pet. 24-26) a conflict with several decisions in which other courts of appeals found particular materials were not relevant to the investigations in which they were issued. But those decisions simply applied the same legal standard utilized in this case to different facts. See *Royal Caribbean Cruises*, 771 F.3d at 761 (when employer admitted it terminated employee based on HIV and Kaposi Sarcoma diagnoses but contended that it did so to comply with Bahamian law, rejecting an EEOC subpoena for "company-wide data regarding employees and appli-

cants around the world with any medical condition, including conditions not specifically covered by the [relevant Bahamian] medical standards or similar to" those of the employee); *EEOC* v. *Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1157-1159 (10th Cir. 2012) (rejecting subpoena seeking to determine how a railroad company "keeps track of every current and former employee, across the country, since 2006" based on individual allegations of disability discrimination by two applicants who applied for the same type of job in the same State); *EEOC* v. *United Air Lines*, 287 F.3d 643, 654-655 (7th Cir. 2002) (rejecting subpoena for information regarding employees worldwide who had taken medical leave or had been laid off and benefits they received, in investigation of flight attendant's charge that employer unlawfully failed to make contributions to French social security system on behalf of Americans employed or living in France). There is no conflict between the enforcement decision here and the decisions cited by petitioners, all of which address differing requests in the context of distinct EEOC investigations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

The EEOC's Brief in Opposition ("Opp.") to McLane's Petition confirms that this Court should issue the writ here. Since *EEOC v. Shell Oil*, 466 U.S. 54 (1984), the circuits have split on: (1) the standard for reviewing a district court's decision to enforce or quash an EEOC subpoena; and (2) how broadly to interpret relevance under *Shell Oil*. Both splits have enormous practical consequences for businesses and charging parties alike, and for the district courts that review EEOC subpoenas in the first instance. The EEOC's response underscores the peril in not granting the writ here.

The EEOC's response concerning the first issue – the acknowledged 8-1 split pitting the Ninth Circuit against most other courts of appeals – is entirely unavailing. The EEOC never disputes that the Ninth Circuit stands alone in applying a *de novo* standard of review to both the questions of law and fact involved in a district court's decision to enforce or quash an EEOC subpoena. The EEOC weakly attempts to recharacterize the district court order below as purely legal, when the opposite is true – the district court properly exercised its discretion to judge factual relevance in a subpoena. Empowering the Ninth Circuit to continue reviewing these issues *de novo* – as the EEOC suggests – would disrespect the superior competency of the district courts to determine these matters in the first instance. Worse yet, that approach builds in a far greater prospect of indefinite review that injures claimants. Consider that Ms. Ochoa

brought her charge in January 2008, and that the district court ruled on the EEOC's subpoenas in April 2012 and November 2012, only to have the Ninth Circuit review its ruling *de novo* and reverse it *in October 2015*. There are good reasons – grounded in district court expertise and efficiency for all – that eight other circuits defer to these rulings. Tellingly, the EEOC never defends the Ninth Circuit's aberrant standard on the merits, for there is nothing helpful about it.

The EEOC's wishful suggestion that McLane somehow waived this issue fails. The panel below was bound by longstanding Ninth Circuit precedent – as the panel below acknowledged – and McLane challenged that precedent at its first meaningful opportunity, seeking rehearing en banc. When it did, the Ninth Circuit unanimously declined to review the issue, making clear that neither that court, nor any panel of it, will fix this problem.

The Court should also grant the petition to resolve the split over the proper standard for relevance under *Shell Oil*. The Ninth Circuit applies a standard so broad it conflicts with *Shell Oil* and grants the EEOC nearly unlimited subpoena power, unmoored to the specific charge under investigation. The EEOC does not dispute the substantial importance of the issue. Instead, it argues that McLane is not really challenging the legal standard, but the application of that standard to the facts. McLane's petition refutes that argument – making clear that the problem is a relevance standard so capacious it cannot be squared with *Shell Oil*. Pet. 21-23. The disparate applications of

Shell Oil are not a function of case-specific facts, but circuit-specific notions of relevance that are intolerably divergent. The Ninth Circuit's capacious standard risks one jurisdiction dictating to many others the standard that will apply across the Nation, despite contrary law in the Fifth, Tenth, and Eleventh Circuits.

This Court should issue the writ to address both of these important conflicts.

ARGUMENT

I. THE EEOC ADMITS THAT THE NINTH CIRCUIT DEPARTS FROM EIGHT OTHER CIRCUITS ON THE STANDARD OF REVIEW OF DECISIONS CONCERNING THE ENFORCEMENT OF EEOC SUBPOENAS.

A. The EEOC Agrees That The Circuits Are Split, But Attempts To No Avail To Claim That This Case Doesn't Exemplify The Split, Based On The Incorrect Claim That The District Court Decision Presented Only Legal Issues.

The EEOC admits that, in applying a *de novo* standard of review to district court decisions regarding enforcement of agency administrative subpoenas, the Ninth Circuit stands apart from eight other circuits that review those decisions deferentially. Opp. 11. The EEOC, however, tries to avoid this Court's resolution of that clear circuit split by incorrectly claiming that the Ninth Circuit's decision below dealt only with legal

questions – which all circuits review *de novo*. Opp. 11-13. Thus, according to the EEOC's fractured syllogism, the Ninth Circuit's decision actually aligns with those of other circuits, and does not merit review.

That is very clearly wrong: there was no legal error here for the Ninth Circuit to review. The district court thought the "pedigree" information sought by the EEOC was *irrelevant*, and held as much. App. 28-30. If the Ninth Circuit really believed, as the government argues, that the district court made the relevance determination using the wrong legal standard, it would have remanded for consideration under the correct standard. *See, e.g.*, *Toyo Tire Holdings of Ams. Inc. v. Cont'l Tire N. Am., Inc.*, 609 F.3d 975, 982 (9th Cir. 2010).

But the Ninth Circuit did no such thing. The reason is simple – the Ninth Circuit's *de novo* review does not apply only to legal questions. Contrary to every other circuit that has considered the issue, the Ninth Circuit reviews what the government calls "the ultimate enforcement decision[]" *de novo*. Opp. 14. And that is exactly what it did here. The Ninth Circuit, in conflict with every other circuit, in essence acted as a district court. It applied the legal standard in the first instance to the cold record facts before it. As McLane's petition explained, this practice contradicts this Court's precedents on choosing the standards of review, and reflects an institutionally inappropriate lack of deference to the sound discretion of district courts. Pet. 16-20.

Moreover, had the Ninth Circuit applied a standard of review consistent with other circuits, as the EEOC insists it did, the Ninth Circuit would not have noted in its opinion the oddity of applying a *de novo* standard of review where other circuits apply a deferential standard. App. 8 n.3. Conspicuously absent from the Ninth Circuit's opinion is any suggestion that its decision would have come out the same way under either standard. By noting its anomalous standard of review, and failing to claim that it did not matter here, the panel decision recognized the need for – indeed, almost requested – the further review McLane seeks. *See* App. 8 n.3.

Importantly, caselaw the EEOC cites to suggest that the Ninth Circuit decision aligns with the other circuits actually proves the opposite. The EEOC relies on *Boehringer Ingelheim* to argue that the Ninth Circuit's application of its *de novo* standard in this case is really no different than any of the other circuits' "frameworks." Opp. 12 (citing *FTC v. Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 148 (D.C. Cir. 2015)). However, *Boehringer Ingelheim* shows how different the Ninth Circuit's standard really is, and thus, how mistaken the EEOC's analysis is.

In *Boehringer Ingelheim*, the D.C. Circuit stated that it reviews "a district court's decision to enforce an administrative subpoena for abuse of discretion," and that a "district court necessarily abuses its discretion if it applies the incorrect legal standard, a question that is reviewed *de novo*." 778 F.3d at 148. After finding that the district court applied the incorrect legal

standard, the D.C. Circuit *remanded the case* for the district court to exercise its discretion under the correct legal standard. *See id.* at 158.

If the Ninth Circuit's decision really was consistent with the other circuits' standards of review, then it would have remanded the case to allow the district court to exercise its discretion consistent with the Ninth Circuit's articulation of the legal standard. But the Ninth Circuit does not apply an abuse of discretion standard to subpoena enforcement cases like the D.C. Circuit. Instead, the Ninth Circuit did what no other circuit's standard of review would allow – it applied a *de novo* review to the "ultimate enforcement decision[]," (Opp. 14), which the EEOC never disputes is at least a mixed question of law *and* fact.

Boehringer Ingelheim thus underscores just how much the Ninth Circuit's *de novo* standard – which the EEOC never defends on the merits – diverges from those applied by other circuits. The EEOC's attempts to argue that the circuits are in harmony fail badly. Review is amply warranted.[1]

---

[1] The EEOC (like the panel below) misreads *University of Pa. v. EEOC*, 493 U.S. 182 (1990), in arguing that it was legal error to equate necessity with relevance. In that case, this Court addressed a far different situation – whether a specific showing of particularized necessity was necessary to overcome a University's claim of privilege against disclosing information. *Id.* at 188.

B. The EEOC's Argument That McLane Waived The Standard Of Review Issue Fails Badly, As Does Its Suggestion That This Court Wait For The Ninth Circuit To Fix The Problem.

The EEOC's wishful argument that McLane "failed to preserve its standard of review argument" because the standard of review issue was "neither presented nor decided below" (Opp. 15) is badly mistaken. The EEOC's related suggestion that this Court should simply wait for the Ninth Circuit to correct its aberrant standard fares no better.

First, McLane presented its challenge to the standard of review at its first real opportunity to do so – seeking review en banc. In the Ninth Circuit, only an en banc panel can overrule circuit precedent, outside narrow exceptions not applicable here. *See, e.g.*, *United States v. King*, 122 F.3d 808, 810 (9th Cir. 1997). The Ninth Circuit's decision itself noted that its unique *de novo* standard "is now firmly entrenched in [Ninth Circuit] case law." App. 8 n.3 (collecting cases). Panel departure from that standard was an impossibility. In circumstances like these, the Ninth Circuit often reviews issues raised for the first time in a petition for rehearing en banc "when a solid wall of circuit authority," as was present here, would have rendered futile a party's attempt to raise the issue before the panel. *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1160 (9th Cir. 2014) (en banc) (citation omitted). Nothing was waived.

Second, the EEOC's assertion that McLane somehow "agree[d]" to the *de novo* standard in panel briefing is wrong, for all the same reasons. McLane simply identified the standard of review the panel was bound to apply. When McLane lost before the panel, it sought rehearing en banc – its first chance to litigate in the Ninth Circuit its disagreement with the standard. *See King*, 122 F.3d at 810.

Third, this record refutes the EEOC's speculation that the Ninth Circuit might correct this aberrant legal standard if left to its own devices. Opp. 14. Given "an appropriate opportunity to reconsider that standard," (Opp. 14) the Ninth Circuit resoundingly declined to do so. Not a single judge voted to take up the case and reconsider its *de novo* standard, despite Judge Watford pointing out its departure from other circuits' standards in the panel decision. App. 8 n.3. There is no reason to think the Ninth Circuit will later review this issue and correct itself, and good reason to think it will not. The EEOC's suggestion that this Court wait to review the issue lacks merit. The time for review is now.

II. THE NINTH CIRCUIT'S EXPANSIVE VIEW OF RELEVANCE IN 42 U.S.C. § 2000e-8(a) IRRECONCILABLY CONFLICTS WITH *SHELL OIL*, AND THE DECISIONS OF OTHER COURTS OF APPEALS.

A. The EEOC Has Not Refuted That The Ninth Circuit's Broad Notion Of Relevance Grants the EEOC Nearly Unlimited Authority, Which Conflicts With This Court's Guidance In *Shell Oil*.

The EEOC argues that McLane has not pointed to any error in the Ninth Circuit's "articulation of the applicable legal rule" and that McLane simply seeks review of the Ninth Circuit's application of the correct legal rule to the facts, which generally does not "warrant this Court's review." Opp. 16. Not so. McLane has already explained at length exactly how the Ninth Circuit's "notion of relevance is so broad that it cannot be squared with *Shell Oil*." Pet. 21.

In *Shell Oil*, this Court cautioned against an overly broad interpretation of "relevance" that would effectively eliminate Congress's limitation of the EEOC's "investigative authority." Pet. 21 (quoting *Shell Oil*, 466 U.S. at 72). This limitation serves an important purpose: to "cabin the EEOC's authority and prevent fishing expeditions." *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002) (citation and internal alterations omitted). Or as the Eleventh Circuit put it, "the EEOC may not enforce a subpoena in the investigation of an individual charge merely as an expedient bypass of the mechanisms required to file

a Commissioner's charge." *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 762 (11th Cir. 2014) (per curiam).

But, as explained in the petition, the Ninth Circuit's relevance standard fails to heed those cautionary notes. It is so broad it would "virtually always permit the EEOC to gather the personal identifying information of every employee of an investigated business – so long as the potential interviewees could conceivably 'cast light on the allegations against' the employer." Pet. 23 (citing App. 9-10). This understanding of relevance far exceeds the standard this Court articulated in *Shell Oil*.

Thus, contrary to the EEOC's assertion, McLane argued more than just a misapplication of the legal standard – it showed that the Ninth Circuit's relevance standard itself does not comport with *Shell Oil* – a conflict worthy of this Court's review.

B. The EEOC's Argument That There Is No Split Among The Circuits As To The Breadth Of Relevance Under *Shell Oil* Fails.

The EEOC acknowledges that circuits applying *Shell Oil*'s relevance standard have reached disparate results but argues that the divergence is just the result of the courts of appeals all applying the same relevance standard to different facts. Opp. 16-17. But as McLane demonstrated in its petition, the differing results were

caused by widely differing notions of relevance under *Shell Oil*, analysis the EEOC sidesteps. Pet. 24-27.

For example, in *Royal Caribbean Cruises*, Royal Caribbean refused to renew an HIV-positive employee's contract because of his medical condition, after which the employee alleged disability discrimination. 771 F.3d at 759. The EEOC then sought information on all individuals either not hired or fired for medical reasons. *Id.* The EEOC argued that this incredibly broad amount of information was relevant because it would help "uncover other potential violations" of the same type. *Id.* at 761. The Eleventh Circuit rejected that broad notion of relevance, finding that "[t]he relevance that is necessary to support a subpoena for the investigation of an individual charge is relevance to the contested issues that must be decided to resolve that charge." *Id.* at 763.

Other courts of appeals have likewise rejected the EEOC's attempt to stretch relevance beyond the bounds this Court laid out in *Shell Oil*. *See, e.g.*, *EEOC v. Burlington N. & Santa Fe R.R.*, 669 F.3d 1154, 1157-58 (10th Cir. 2012) ("Any act of discrimination could be part of a pattern or practice of discrimination, but not every charge of discrimination warrants a pattern or practice investigation."); *EEOC v. Packard Elec. Div.*, 569 F.2d 315, 316-18 (5th Cir. 1978) (affirming district court decision tailoring disclosure to charges rather than letting EEOC obtain "broad statistical information as to the respective employers' entire work force").

Key to this determination in every circuit but the Ninth are the facts actually alleged in the charge – in keeping with the statutory mandate. Otherwise, the EEOC could use virtually any charge to cast a broader net for information – and this case exemplifies that the danger is not just theoretical, but real. The Ninth Circuit's capacious relevancy standard (especially when coupled with its *de novo* review standard) permits the EEOC unfettered access to virtually everything that could conceivably fall within a claim. That wrong-headed approach conflicts with both the statutory structure and the EEOC's own enforcement mechanisms. *See Royal Caribbean Cruises*, 771 F.3d at 762.

This case exemplifies the problem. The panel took the original charge that McLane's nationwide "use of the strength test discriminates on the basis of sex" – a disparate *impact* charge – and allowed it to justify the EEOC's desire to "learn more about [employee and applicant] experiences" – information that would be pertinent to a disparate *treatment* charge. *See* App. 10. But untethering the subpoena request from the actual charge cannot be squared with 42 U.S.C. § 2000e-8(a), which limits the Commission's subpoena power to evidence "relevant to the charge under investigation."

And not only was a disparate treatment claim absent from the charge, but such a claim would also apply only to the location where an employee or applicant is treated in a disparate fashion. The EEOC could not have obtained the nationwide pedigree information at issue on a disparate treatment charge, a fact well understood by the district court. Despite this, the Ninth

Circuit gave the EEOC broad access to private information that should only have been available on a disparate impact charge (or if the EEOC had filed a Commissioner charge). *See* Donald R. Livingston, *EEOC Litigation and Charge Resolution* 243-44 (BNA 2005).

In sum, the Ninth Circuit's capacious notion of relevance departs significantly from the text of 42 U.S.C. § 2000e-8(a), this Court's elaboration of it in *Shell Oil*, and the decisions of other courts of appeals faithfully applying *Shell Oil*. As already explained in the petition (and not disputed by the EEOC), that divergence portends serious practical consequences for employers across the Nation. Pet. 26-30 (noting breadth and far-reaching impact of EEOC subpoenas); *Amicus* Br. 13-21 (highlighting disclosure and data-breach risks with furnishing the government with "voluminous confidential and sensitive data that have no relevance to the charge under investigation"); App. 16 (noting "government's dismal performance in protecting even its own employees' sensitive data") (Smith, J., concurring). This Court should grant review and resolve this split so the EEOC functions within the parameters set out by Congress in 42 U.S.C. § 2000e-8(a) and elaborated by this Court in *Shell Oil*.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted.

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of the Petition for a Writ of Certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. Both parties have consented to the filing of this brief. Counsel for *amicus curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws enforced by the U.S. Equal Employment Opportunity Commission (EEOC). As employers, and as potential targets of EEOC discrimination charge investigations and enforcement actions, EEAC's members have a substantial interest in the issue presented in this matter concerning the authority of the EEOC to compel the production of evidence that is irrelevant to resolution of the specific charge under investigation.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed numerous briefs as *amicus curiae* in cases before this Court and the courts of appeals involving the proper

construction and interpretation of Title VII and other federal laws.[2]

EEAC seeks to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant information that has not already been brought to its attention by the parties. Because of its experience in these matters, EEAC is well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Petitioner McLane Company (McLane) administers a physical capability test to all new hires, as well as to current employees returning from medical leaves of absence. Pet. App. 3. Damiana Ochoa was required to take the test before being allowed to return to work from maternity leave. *Id.* She took and failed the test three times, and therefore was not permitted to return to work. *Id.*

Ochoa subsequently filed an administrative charge with Respondent EEOC, alleging that use of the test discriminated against her on the basis of sex (pregnancy) in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended. Pet. App. 2.

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[2] *See, e.g., EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984); *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645 (2015); *Gross v. FBL Fin. Svcs., Inc.*, 557 U.S. 167 (2009); *Burlington Northern & Santa Fe Rwy. v. White*, 548 U.S. 53 (2006); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

As part of its investigation of the Ochoa charge, the EEOC asked McLane to provide extensive information about the test, including, for each person who took it:

- name, sex, date of birth, social security number, and contact information;
- disability status;
- the reason why he or she was required to take the test;
- test score; and
- reason for termination, if applicable.

Pet. App. 3-4, 20-21. The EEOC's request for information was not limited to the McLane facility where Ochoa worked, but rather extended to all McLane facilities nationwide. *Id.*

McLane challenged the breadth and scope of the information request. The EEOC responded by issuing a subpoena, in response to which McLane provided a database of all individuals who took the test nationwide by sex, location, position, test date, reason for the test, score, and (for applicants) whether the test taker was deemed minimally qualified for the position. *Id.* Dissatisfied, the EEOC filed an action in the U.S. District Court for the District of Arizona to enforce the subpoena.

In opposition, McLane argued that the EEOC was not entitled to any disability-related information, because Ochoa does not claim either to be disabled or that she was discriminated against because of actual or perceived disability. Pet. App. 23-26. It also contended that the additional "pedigree" information sought by the EEOC, including (among other data) name, date of birth, social security number, last known address, and phone number, was not relevant

to whether or not use of the test discriminated against Ochoa because of her pregnancy. Pet. App. 20-21. Finally, McLane argued that the information pertaining to the "reason for termination" for all those who took the test was overly broad and unduly burdensome. *Id.*

The district court refused the EEOC access to the disability-related information on the ground that Ochoa could not state a claim for disability discrimination. Pet. App. 25-27. The district court also found that the additional pedigree information sought in this case – in particular, the names, contact information, and social security numbers of individual employees – was not relevant to resolution of the Ochoa charge:

> [A]n individual's name, or even an interview he or she could provide if contacted, simply could not "shed light on" whether the [test] represents a tool of gender discrimination in the aggregate. The EEOC has provided nothing to the Court to allay the concerns raised by McLane that such data has been requested as a means of trolling for possible complainants.

Pet. App. 29. The district court also declined to require McLane to produce the "reason for termination" information. Pet. App. 30-31.

The EEOC appealed the district court's order denying enforcement of its subpoena for pedigree and termination information, but only as to the sex discrimination claims. Pet. App. 1, 5. It abandoned the argument that the subpoena should be enforced because of its purported relevance to suspected disability discrimination. Pet. App. 5-6.

The Ninth Circuit reversed the district court, enforcing the EEOC's subpoena for nationwide pedigree information. Pet. App. 15-16. It reasoned that the information was relevant because it would allow the EEOC to identify and contact other test takers who might have information casting light on Ochoa's allegations against McLane. Pet. App. 10-14. It also ruled that information concerning McLane's termination of other test takers was relevant, but remanded on the issue of whether requiring production of such information would be unduly burdensome. Pet. App. 14-16.

After its request for rehearing *en banc* was denied, McLane filed a Petition for a Writ of Certiorari with this Court on April 4, 2016.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision below, which rubber-stamped an overbroad administrative subpoena for nationwide data having no relevance to the allegations of the EEOC discrimination charge being investigated, is contrary to Title VII's plain text and this Court's holding and rationale in *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), and is inconsistent with interpretations of at least three federal courts of appeals. The lower court's misapplication of Title VII, as construed in *Shell*, will have an immediate and widespread effect on the conduct of EEOC charge investigation activities nationwide, to the profound disadvantage of employers and employees alike. Accordingly, this Court should grant the petition and reverse the decision below.

The relevance of an EEOC inquiry must be inextricably tied to the harm allegedly suffered by the

individual charge-filer. This interpretation is most consistent with Title VII and its requirement that the charging party be personally aggrieved. 42 U.S.C. § 2000e-5. Permitting the EEOC to demand information pertaining to issues outside the scope of the underlying charge also would unfairly deprive employers – large and small – of the due process guarantees to which they are entitled. More importantly, however, unfocused efforts such as these do little, if anything, to satisfy the EEOC's obligations to individual charging parties whose claims are, for all intents and purposes, left to languish while the agency pursues bigger "fish."

Indeed, there has been a steady shift at the EEOC towards incentivizing staff to seek out claims with potentially broad-based, systemic implications, which serves only to increase the agency's use of fantastically broad and irrelevant investigative subpoenas, to the detriment of employer-respondents, as well as to individual charging parties.

Furthermore, allowing the EEOC to obtain overly broad and irrelevant employment data, which often contain highly sensitive information such as employee social security numbers, unnecessarily increases the risk that such information will become available to the public, either through the charging party or as a result of an unauthorized data breach. At a minimum, when the EEOC requests sensitive data, the relevance of and need for the information must be balanced against the harm that will be suffered if the information is disclosed. The Court should use this case as an opportunity to clarify the meaning of *Shell Oil* in light of the cybersecurity and data breach concerns that have become so prevalent in recent years.

REASONS FOR GRANTING THE WRIT

REVIEW OF THE DECISION BELOW IS NECESSARY TO PROVIDE CLARITY ON ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

The EEOC is authorized by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII sets forth "'an integrated, multistep enforcement procedure' that ... begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *Shell Oil Co.*, 466 U.S. at 62 (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)); *see also EEOC v. Univ. of Pa.*, 493 U.S. 182, 190 (1990). Upon the filing of a charge, Title VII provides that the EEOC "shall make an investigation thereof ...." 42 U.S.C. § 2000e-5(b).

In conducting discrimination charge investigations, the EEOC does not possess unfettered discretion to seek out other forms of discrimination not alleged by the charging party and outside the scope of its reasonable investigation of the charging party's claims. To the contrary, its authority to compel the production of evidence is limited to materials "relevant" to the allegations in the charge. 42 U.S.C. § 2000e-8(a). Thus, "unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled ... access only to evidence '*relevant to*

the charge under investigation.'" Shell Oil Co., 466 U.S. at 64 (citation and footnote omitted) (emphasis added).

By enforcing a wildly overbroad administrative subpoena for nationwide data having no relevance to the allegations of the charge being investigated, the Ninth Circuit disregarded Title VII's plain text and contravened this Court's admonitions in *Shell Oil*. Accordingly, the petition should be granted and the decision below reversed.

A. The Ninth Circuit's Decision Below Is Contrary To Title VII's Plain Text And This Court's Decision In *EEOC v. Shell Oil*

The EEOC's investigative power derives from the charges that are filed with it. *Shell Oil Co.*, 466 U.S. at 64. As such, during an investigation, the EEOC is only entitled to evidence that is relevant to the issues raised in the underlying discrimination charge. 42 U.S.C. § 2000e-8. The applicable statutory authority provides:

> In connection with any investigation of a charge filed under section 706 [42 U.S.C. § 2000e-5], the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this [subchapter] *and is relevant to the charge under investigation.*

42 U.S.C. § 2000e-8(a) (emphasis added).

Thus, in vesting the EEOC with primary responsibility for enforcing Title VII, Congress unambiguously restricted the EEOC's subpoena power to inspecting and copying evidence relevant to the charge under investigation. *Id.* This "requirement of relevance, like the charge requirement itself, is designed to cabin the EEOC's authority and prevent 'fishing expeditions.'" *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002) (quoting *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1066 (6th Cir. 1982)). As this Court emphasized in *Shell Oil*, "Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity." 466 U.S. at 69.

In this case, the EEOC's subpoena extends well beyond the four corners of the Ochoa charge, seeking, among other things, personal pedigree information such as social security numbers and dates of birth about all McLane test takers nationwide. It contains no meaningful boundaries whatsoever and, if found to be valid and enforceable as written, essentially would authorize the agency to launch a full-scale, unconstrained audit of myriad employment practices affecting McLane employees generally.

When the EEOC exceeds its statutory authority by issuing subpoenas for information pertaining to matters outside the bounds of the allegations being investigated, it unilaterally dispenses with Title VII's statutory requirements, as explained by this Court in *Shell Oil*, and robs employers of the basic protections they afford. *EEOC v. Bailey Co.*, 563 F.2d 439, 450 (6th Cir. 1977). By permitting the EEOC, in seeking enforcement of its administrative subpoena, "merely

to allege that an employer has violated Title VII," *Shell Oil*, 466 U.S. at 72, the Ninth Circuit effectively has "render[ed] nugatory the statutory limitation of the Commission's investigative authority to materials 'relevant' to a charge," *id.*, and thereby has thwarted "Congress' desire to prevent the Commission from exercising unconstrained investigative authority ...." *Id.* at 65.

B. The Ninth Circuit's Ruling Is At Odds With Other Circuits That Have Interpreted *Shell Oil* As Limiting The Scope Of An EEOC Inquiry To Matters Relevant To The Specific Charge Being Investigated

The Ninth Circuit's decision below also is at odds with other courts that have addressed this issue. In *EEOC v. Southern Farm Bureau Casualty Insurance Co.*, for instance, the Fifth Circuit refused to enforce an EEOC subpoena seeking information concerning *gender* in connection with the investigation of a *race* discrimination charge. 271 F.3d 209, 211-12 (5th Cir. 2001). The court observed that the EEOC's authority to demand information is not unlimited, but rather must be based on the specific claims raised in a valid charge. *Id. See also EEOC v. Kronos, Inc.*, 620 F.3d 287, 300-02 (3d Cir. 2010) (inquiry into potential race discrimination is not a reasonable expansion of a disability discrimination charge); *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 761 (11th Cir. 2014) (affirming lower court's decision not to enforce EEOC subpoena where information sought in subpoena, which pertained to employees and applicants across the globe, would not aid the EEOC in resolving the disputed issues in the specific charge being investigated); *EEOC v. United Air Lines, Inc.*, 287 F.3d 643,

655 (7th Cir. 2002) (refusing to enforce portions of subpoena that sought information unrelated to charge of discrimination because "[a]llowing the EEOC to conduct such a broad investigation would require [the court] to disregard the Congressional requirement that the investigation be based on the charge").

Even the EEOC's own *Compliance Manual* counsels investigators against collecting irrelevant information and data exceeding the scope of the charging party's allegations, instructing them, for example, to collect only evidence that is both "material to the charge" and "relevant to the issue(s) raised in the charge." EEOC Compl. Man., Section 602: Evidence, § 602.4 Quality of Evidence, 2006 WL 4672676 (Aug. 2009). Evidence is *material*, the agency explains, "when it relates to one or more of the issues raised by a charge ... or by a respondent's answer to it." *Id.* at § 602.4(a) *Material evidence*. Evidence is *relevant* "if it tends to prove or disprove [a material] issue raised by a charge." *Id.* at § 602.4(b) *Relevant evidence*.

Accordingly, the manual explains that where the charging party alleges that the employer denied "training, assignments, pay increases, retention rights, transfer, and promotion ... to laid off employees eligible to retire but made available to younger employees," material evidence would include "information on [the charging party] and his/her performance; information on the ages, positions, and performance of laid off employees, remaining employees, and recalled employees; copies of company benefit plans and policy statements; any actuarial data used to support benefit reductions; and testimony" but would *not* include "[v]oluminous data ... which has nothing to do with [the] employment practices [being] investigated ...." *Id.* at § 602.4(a) *Example 2*.

The subpoena at issue here seeks a variety of information and documents pertaining to personally identifiable and other information for all McLane employees who took the physical capability test, including dates of birth, social security numbers, dates of application, and dates of hire. These data will do nothing to shed light upon Ochoa's Title VII pregnancy discrimination claim, however, and should be held beyond the agency's investigative reach.

Allowing the EEOC to seek out information pertaining to issues outside the scope of the charge being investigated would discourage employers from providing thorough and comprehensive responses for fear that such information likely would trigger an "expanded" investigation. At worst, such a practice could lead employers to refuse to provide *any* information requested in connection with a charge investigation, thereby forcing the EEOC each time to go through the time-consuming and tedious process of attempting to compel production of the data it seeks.

C. The Decision Below Increases Significantly The Risk Of Disclosure Of Confidential Information And Resulting Irreparable Harm To Employers And Employees

Most companies understandably are reluctant to hand over to the EEOC voluminous, confidential business and employee information that has no relevance to resolution of issues raised in a pending charge of discrimination. There are many reasons for this reluctance, including the fear that the information may be given to the charging party (perhaps a former employee with an axe to grind) and/or become the casualty of a data breach. Allowing the EEOC to

obtain broad categories of sensitive employment data that are not carefully tailored to elucidate allegations raised in the specific charge being investigated unnecessarily increases the risk that confidential employer and employee information will become available to a competitor or to the public. Because *Shell Oil* was decided at a time when cybersecurity and data breach concerns were nonexistent, this Court should use this case as an opportunity to provide much needed clarity as to its meaning in this context.

EEOC investigators *routinely* exceed their authority by asking employers to hand over confidential and sometimes highly sensitive business and employee information during charge investigations, even when the information has no relevance to the underlying charge. Disclosure of only marginally relevant employee data increases the risk that such information will be disclosed to the charging parties or worse, accessed by criminals through an unauthorized data breach.

Depending on the case, the EEOC might demand that an employer provide information relating to recruitment, hiring and promotional practices, workplace policy and procedure, organizational structure and succession planning, compensation and benefits, as well as many other employment-related practices that in one way or another shed light on the company's structure and operations. EEOC Compl. Man., Section 26: Selection and Analysis of Evidence, § 26.9 Records Maintained by Employers, 2006 WL 4673119 (Aug. 2009); *see also EEOC v. Ford Motor Credit Co.*, 26 F.3d 44 (6th Cir. 1994) (EEOC seeking detailed employment data for all workers employed at respondent's facility for a period of twelve years, including job titles, starting grade level and salary, assignments

and promotions). Moreover, the agency can (and frequently does) require unrestricted access to electronic payroll, accounting, and human resource data relating to specific individuals, entire business units and work facilities—often, as here, on a company-wide basis. EEOC Compl. Man., Section 26: Selection and Analysis of Evidence, § 26.3 Selection of Records, 2006 WL 4673113 (Aug. 2009); *see also EEOC v. Technocrest Sys., Inc.*, 448 F.3d 1035, 1037 (8th Cir. 2006) (EEOC requesting "the complete contents of all personnel files and records" for all technical employees of the company). These broad requests for data also can seek sensitive personal information, including employee social security numbers and other pedigree information.

Once this information is given to the EEOC, it becomes part of the investigative file and is subject to disclosure under the agency's disclosure rules, which means that in certain circumstances it can be viewed by the charging party or witnesses. The EEOC discloses information from case files pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 *et seq.*, and Section 83 of the EEOC's Compliance Manual. *See* EEOC Compl. Man., Section 83: Disclosure of Information in Charge Files (May 2016). And while the EEOC is only supposed to release non-confidential materials to the charging party, under a recently announced nationwide policy, the agency has indicated that it will unilaterally decide whether a document marked by an employer as "confidential" is sufficiently proprietary to justify withholding it from a charging party. *See* EEOC, *Effective Position Statements, available at* https://www.eeoc.gov/employers/position_statements.cfm. The EEOC has acknowledged that its investigators can

and routinely do share confidential business information supplied by employers with charging parties and witnesses in all types of cases as an "investigative technique" for the purpose of "elicit[ing] more information." *See Venetian Casino Resort, L.L.C. v. EEOC*, 409 F.3d 359, 362 (D.C. Cir. 2005). Turning over confidential employer information to an employee or former employee that may be seeking retribution carries significant risk.

Setting aside the dangers posed by providing confidential employer information to charging parties, there is also a very real concern today over electronic data breaches. Recent high-profile government agency data breaches highlight the risks of permitting the EEOC to maintain vast amounts of proprietary and sensitive information electronically.[3] Inadvertent disclosure of the sensitive and confidential information collected by the EEOC during its investigations would have predictably damaging (and often irreparably harmful) consequences. And the EEOC currently has no meaningful process in place to reasonably guard against the types of massive data breaches that have resulted in far reaching litigation and harm to a number of businesses.[4]

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[3] *See, e.g.*, Statement of OPM Press Secretary (Sept. 15, 2015), *available at* https://www.opm.gov/news/releases/2015/09/cyber-statement-923/ (last visited May 5, 2016) (reporting that a recent government data breach resulted in theft of personal information of 21.5 million individuals, including social security numbers and fingerprint data).

[4] Indeed, the EEOC's current written procedures do little to ensure protection of confidential information that is produced during investigations. *See, e.g.*, EEOC Compl. Man., Section 83: Disclosure of Information in Charge Files, § 83.6(a) (May 2016), *available at* https://www.eeoc.gov/eeoc/foia/section83.cfm:

With these risks of disclosure in mind, it is all the more important for the EEOC's investigative authority to be appropriately constrained. The EEOC's standard practice of requesting voluminous confidential and sensitive data that have no relevance to the charge under investigation unnecessarily increases the amount of information subject to harmful disclosure. Proper application of *Shell Oil* and the Title VII principles underlying it would minimize the risk of such threats.

D. The EEOC's Increasingly Aggressive Investigation And Enforcement Philosophy Reinforces The Need To Clarify The Limited Scope Of Its Subpoena Authority

The EEOC's disregard for the statutory constraints on its investigative and enforcement authority is well-documented, causing harm to employers as well as employees. If the decision below is permitted to stand, the EEOC undoubtedly will continue (even formalize) the practice of crafting vague and indefinite charges for the purpose of conducting unfettered "fishing expeditions" – in direct contravention of its statutory mandate. *See Shell Oil*, 466 U.S. at 90 ("Experience teaches that Government administrative agency investigations can be prone to abuse [and] are likely

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Security of Files, Copies Made by Others – Offices may require requesters to make special arrangements to have copies made by persons other than EEOC (or its contractor's) staff. Persons granted access to files are not normally permitted to remove files from EEOC's (or its contractor's) premises. District Directors or designees may allow a file to be copied away from the premises in unusual circumstances if proper safeguards are observed to prevent loss or mutilation of the file.

to be conducted more reasonably, more carefully, and more fairly, when the concerned parties are adequately notified of the causes of the investigation that are in progress") (O'Connor, J., concurring in part, dissenting in part).

Such a result would deny employers a meaningful opportunity to respond to charges and unfairly rob them of the "due process guaranties" to which they are entitled. *EEOC v. Bailey Co.*, 563 F.2d 439, 450 (6th Cir. 1977) (citation omitted).[5] This case thus presents the Court with an opportunity to clarify *Shell Oil* in light of the EEOC's recent, notoriously aggressive enforcement tactics which have become standard practice in recent years.

The EEOC holds a highly leveraged position over the employers it investigates, which is no surprise, given the "vast disparity of resources between the government and private litigants." *EEOC v. Great Steaks, Inc.*, 667 F.3d 510, 519 (4th Cir. 2012). As noted, the EEOC routinely capitalizes on its position of advantage by serving overly broad requests for information that are unconnected to the particular allegations of the charge under investigation. *See, e.g., Southern Farm Bureau*, 271 F.3d at 211-12; *Kronos,*

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[5] The EEOC has a variety of statutory tools at its disposal for the purpose of investigating and eradicating employment discrimination. The very purpose of a Commissioner charge, for example, is to enable the agency to investigate possible discrimination in situations where either no individual charge has been filed or where discrimination is believed to be "more widespread than the specific allegations made by an individual charge." Donald R. Livingston, *EEOC Litigation and Charge Resolution* 243-44 (BNA 2005). The EEOC should not be permitted to circumvent the statute's requirement that it obtain a Commissioner charge where, as here, it otherwise lacks the authority to investigate allegations not contained in the charge.

620 F.3d at 300-02; *Royal Caribbean Cruises*, 771 F.3d at 761; *United Air Lines*, 287 F.3d at 655. An employer served with such a request often will find itself in an untenable position of either incurring substantial costs to produce the requested irrelevant information or incurring substantial costs to fight, just to risk losing and then being compelled to incur the costs to produce the documents anyway. While the EEOC often targets large companies, employers with as few as 15 employees are subject to the laws the EEOC enforces, and thus also are potential targets of these abusive information requests. In one case, the EEOC was criticized for its "highly inappropriate" and "dogged pursuit" of a small business whereby it sought extremely broad categories of documents that were unrelated to any aggrieved person's charge of discrimination. *EEOC v. HomeNurse, Inc.*, 2013 WL 5779046, *14 (N.D. Ga. Sept. 30, 2013). The district court refused to enforce the subpoena, concluding that the agency's actions in that case "constitute[d] a misuse of its authority." *Id.*

A number of courts have sanctioned the EEOC for prosecutorial abuses in similar contexts. *See, e.g. EEOC v. Freeman*, 778 F.3d 463, 472-73 (4th Cir. 2015); *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 616 (6th Cir. 2013); *EEOC v. TriCore Reference Labs.*, 493 F. App'x 955, 960-61 (10th Cir. 2012); *EEOC v. West Customer Management Group, LLC*, 2014 WL 4435980, at *1 (N.D. Fla. Sept. 8, 2014); *EEOC v. U.S. Steel Corp.*, 2013 WL 625315 (W.D. Pa. Feb. 20, 2013). The EEOC also has garnered considerable criticism from members of Congress, who have taken the agency to task for among other things "pursuing

many questionable cases through sometimes overly aggressive means."[6]

In recent years, the EEOC has put a high priority on pursuing systemic litigation where alleged discrimination has a potentially broad impact on an industry, profession, company or geographic area. In fact, the agency requires its field offices to ensure that a specific percentage of its lawsuits is systemic in nature. *See* EEOC, Fiscal Year 2015 Performance and Accountability Rep. 22 (Systemic Cases – Performance Measure 4).[7] These systemic case quotas serve to further encourage the EEOC to disregard the statutory limits on its investigative authority by demanding overly broad company-wide information that has no connection to the charge under investigation.

However, these self-imposed systemic case quotas have no statutory basis, and undermine effective enforcement of employment discrimination laws by diverting valuable resources away from investigations of ripe claims contained in a filed charge, and towards unbridled fishing expeditions in search of class-based, systemic claims. Indeed, "the [EEOC has] gone far afield of [its] critical task, allowing its massive backlog of unresolved cases to climb to more than 76,000, while pursuing cases where there is no complaint ...." Press Release, Sen. Lamar Alexander, *Appropriations*

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[6] *See EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns About Important Anti-Discrimination Agency*, U.S. Sen. Comm. on Health, Educ., Labor and Pensions, Minority Staff Rep. 3 (Nov, 24, 2014), *available at* http://www.help.senate.gov/imo/media/doc/FINAL%20EEOC%20Report%20with%20Appendix.pdf (last visited May 5, 2016).

[7] *Available at* https://www.eeoc.gov/eeoc/plan/upload/2015par.pdf (last visited May 5, 2016).

Committee Advances Bill Directing EEOC to Focus on "Massive" Backlog of 76,000 Unresolved Workplace Discrimination Cases (Apr. 21, 2016).

CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council respectfully requests the Court grant the Petition for a Writ of Certiorari and reverse the decision below.

Respectfully submitted,

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RECORD AND BRIEFS

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MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX VOLUME I

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United States Court of Appeals for the Ninth Circuit, Order Denying Petition for Rehearing, January 22, 2016 ..... App. 34

Relevant Docket Entries for the United States District Court District of Arizona (Phoenix Division) CIVIL DOCKET FOR CASE #: 2:12-cv-02469-GMS

Date Filed	#	Docket Text
08/14/2012	1	Miscellaneous Case Opening Regarding: Application for an Order to Show Cause Why an Administrative Subpoena Should not be Enforced, filed by Equal Employment Opportunity Commission (submitted by Meenoo Chahbazi). (Attachments: #1 Text of Proposed Order, # Civil Cover Sheet)(REK) (Entered: 08/14/2012)
08/14/2012	2	MEMORANDUM in Support of 1 Application For an Order to Show Cause Why an Administrative Subpoena Should not be Enforced by Petitioner Equal Employment Opportunity Commission (submitted by Meenoo Chahbazi). (Attachments: # 1 Exhibit, # 2 Exhibit)(REK) (Entered: 08/14/2012)
08/22/2012	4	ORDER granting 1 Motion for Order to Show Cause, Show Cause Hearing set for 10/17/2012 at 04:00 PM in Courtroom 603, 401 West Washington Street, Phoenix, AZ 85003 before Judge David G Campbell. Show Cause Response due by 9/26/2012. Signed by Judge David G

		Campbell on 8/22/2012.(NVO) (Entered: 08/22/2012)
09/26/2012	9	RESPONSE to Motion re 1 MOTION for Order to Show Cause filed by McLane Company Incorporated. (Attachments: # 1 Exhibit A Part 1, # 2 Exhibit A Part 2, #3 Exhibit B Part 1, #4 Exhibit B Part 2, # 5 Exhibit B Part 3, #6 Exhibit B Part 4, #7 Exhibit B Part 5, # 8 Exhibit C, #9 Exhibit D, # 10 Exhibit E, # 11 Exhibit F)(Kasarjian, Ashley) (Entered: 09/26/2012)
10/23/2012	15	*REPLY *to McLane's Response to Order to Show Cause* by Petitioner Equal Employment Opportunity Commission. (Attachments: # 1 Exhibit 5, # 2 Exhibit 6, # 3 Exhibit A, # 4 Exhibit B)(Chahbazi, Meenoo) *Modified on 10/26/2012 to Seal Exhibit B Pursuant to Order 18 (MAP)*. (Entered: 10/23/2012)
11/16/2012	26	Minute Entry in MC-12-00081-PHX-GMS and CV-12-02469-PHX-GMS for proceedings held before Judge G Murray Snow: Show Cause Hearing held on 11/16/2012. Order to follow. The parties are directed to file all future pleadings with the new civil case number CV-12-02469-PHX-GMS.

		APPEARANCES: Mary O'Neill and Sean Ratiff for Petitioner. Ashley Kasarjian, Joshua Woodard, and Ellen Perlioni for Respondent. (Court Reporter Gary Moll.) This is a TEXT ENTRY ONLY There is no PDF document associated with this entry. (KFZ) (Entered: 11/16/2012)
11/19/2012	27	ORDER granting 12 Motion to Seal. The Clerk of Court is directed to file under seal the lodged proposed exhibits (Doc. 13). FURTHER ORDERED Denying as moot McLane's 22 Motion to Strike Exhibits. FURTHER ORDERED. Regarding those people who applied to McLane and took the IPCS PCE, McLane must provide the E.E.O.C. one of the following: SEE ORDER FOR DETAILS. FURTHER ORDERED The Clerk of Court is directed to terminate this action. Signed by Judge G Murray Snow on 11/19/12.(MAP) (Entered: 11/19/2012)
11/19/2012	28	Sealed Exhibits re 15 filed by Equal Employment Opportunity Commission. (Attachments: #1 Exhibit, # 2 Exhibit, # 3 Exhibit)(MAP) (Entered: 11/19/2012)

01/17/2013	32	NOTICE. OF APPEAL to 9th Circuit, as to 27 Order by Equal Employment Opportunity Commission. (Ratliff, Sean) (Entered: 01/17/2013)

Relevant Docket Entries for the United States Court of Appeals for the Ninth Circuit (CIVIL DOCKET FOR CASE #: 13-15126)

Date Filed	#	Docket Text
06/03/2013	12	Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellant EEOC. Date of service: 06/0312013. [8652178]—[COURT UPDATE: Attached compatible version of PDF for volume 2 of excerpts. 02/05/2015 by RY] (Tucker, James) [Entered: 06/03/2013 12:23 PM]
08/02/2013	18	Submitted (ECF) Answering Brief for review. Submitted by Appellee McLane Company, Inc.. Date of service: 08/02/2013. [8728430] (Perlioni, Ellen) [Entered: 08/02/2013 12:53 PM]
08/02/2013	19	Submitted (ECF) supplemental excerpts of record. Submitted by Appellee McLane Company, Inc. Date of service: 08/02/2013. [8728450] (Perlioni, Ellen) [Entered: 08/02/2013 01:06 PM]
08/02/2013	20	Filed (ECF) Appellee McLane Company, Inc. Motion to take judicial notice of. Date of service: 08/02/2013. [8728475] (Perlioni, Ellen) [Entered: 08/02/2013 01:21 PM]

09/16/2013	26	Submitted (ECF) Reply Brief and supplemental excerpts of record for review. Submitted by Appellant E.E.O.C. Date of service: 09/16/2013. [8782970] (Tucker, James) [Entered: 09/16/2013 09:54 AM]
10/27/2015	36	Filed order (J. CLIFFORD WALLACE, MILAN D. SMITH, JR. and PAUL J. WATFORD) Appellee's request that we take judicial notice of the order in EEOC v. McLane Co., 2012 WL 1132758 (D. Ariz. Apr. 4, 2012), is GRANTED. [9733528] (RMM) [Entered: 10/27/2015 08:16 AM]
10/27/2015	37	FILED OPINION (J. CLIFFORD WALLACE, MILAN D. SMITH, JR. AND PAUL J. WATFORD) REVERSED in part, VACATED in part, and REMANDED. Judge: MDS Concurring, Judge: PJW Authoring. FILED AND ENTERED JUDGMENT [9733533] (RMM) [Entered: 10/27/2015 08:27 AM]
12/11/2015	43	Filed (ECF) Appellee McLane Company, Inc. petition for rehearing en banc (from 10/27/2015 opinion). Date of service: 12/11/2015. [9790237] [13-15126] (Perlioni Ellen) [Entered: 12/11/2015 06:31 PM]
12/18/2015	44	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Chamber of Commerce of the

		United State [sic] of America. Date of service: 12/18/2015. [9799048] [13-15126]—[COURT UPDATE: Attached certificate of service to end of brief. 12/21/2015 by RY] (Lapp, Richard) [Entered: 12/18/2015 02:54 PM]
01/22/2016	48	Filed order (J. CLIFFORD WALLACE, MILAN D. SMITH, JR. and PAUL J. WATFORD): Judge Smith and Judge Watford vote to deny the petition for rehearing en banc, and Judge Wallace so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc, filed December 11, 2015, is DENIED. [9836570] (AF) [Entered: 01/22/2016 09:27 AM]

[Doc. 1]

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc. Respondent.	**Case No.** **APPLICATION FOR AN ORDER TO SHOW CAUSE WHY AN ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED** (Filed Aug. 14, 2012)

1. This is an action for enforcement of a subpoena issued pursuant to Section 710 of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-9, and Section 107(a) of the Americans

with Disabilities Act of 1990 as amended (ADA), 42 U.S.C. § 12117(a).[1]

2. Jurisdiction is conferred upon the court by Section 107(a) of the ADA, 42 U.S.C. § 12117(a), which incorporates Sections 706(f)(3) and 710 of Title VII, 42 U.S.C. §§ 2000e-5(f)(3) and 2000e-9, the latter of which incorporates Section 11 of the National Labor Relations Act, 29 U.S.C. § 161.

3. Petitioner, the Equal Employment Opportunity Commission ("EEOC" or "Commission"), is the federal agency charged with the administration, interpretation and enforcement of the ADA and Title VII, including the investigation of charges of unlawful employment practices, and is authorized to bring this action pursuant to Section 107(a) of the ADA, 42 U.S.C. § 12117(a) and Section 710 of Title VII, 42 U.S.C. § 2000e-9.

4. The Respondent, McLane Company, Inc. is an employer doing business in the State of Arizona with a facility in Goodyear, Arizona.

5. On February 15, 2011, pursuant to its authority under 29 U.S.C. § 161[2], the EEOC issued to the Respondent Subpoena No. PHX-11-32, which was duly served on the Respondent.

6. Subpoena PHX-11-32 required the Respondent to produce information needed as part of the EEOC's

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[1] 42 U.S.C. § 12117(a) incorporates Section 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-9.

[2] 29 U.S.C. § 161 is incorporated in Section 710 of Title VII, 42 U.S.C. § 2000e-9, which, in turn, is incorporated in Section 107(a) of the ADA, 42 U.S.C. § 12117(a).

investigation into whether the Respondent has engaged in employment practices made unlawful by the ADA and Title VII.

7. The Respondent filed a Petition to Revoke or Modify the subpoena on February 22, 2011. On March 21, 2012, the Commission issued a determination denying Respondents Petition to Revoke or Modify, and requiring the requested information to be submitted to the EEOC within 20 days.

8. The Respondent has provided some information but has refused to comply fully with Subpoena No. PHX-11-32 and has not provided the essential information requested.

9. Respondent's failure to comply fully with the Subpoena has delayed and hampered the EEOC's investigation.

10. The accompanying Memorandum and Declaration of Elizabeth Cadle, Deputy Director, filed concurrently herewith, and the additional exhibits to the application, provide the factual and legal support for this application. The Memorandum, Declaration, and the attachments are incorporated by reference into this application.

WHEREFORE, the Equal Employment Opportunity Commission prays:

a) That the Court issue an Order directing the Respondent to appear before this Court and to show cause, if there be any, why an order should not issue directing the Respondent to comply with the Subpoena;

b) That, upon return of the Order to Show Cause, an order issue directing the Respondent to comply with the Subpoena, and;

c) That the Equal Employment Opportunity Commission be granted its costs and such further relief as may be necessary and appropriate.

RESPECTFULLY SUBMITTED this 14th day of August, 2012.

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/s/ Meenoo Chahbazi
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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc. Respondent.	Case No. **MEMORANDUM IN SUPPORT OF APPLICATION FOR AN ORDER TO SHOW CAUSE WHY AN ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED** (Filed Aug. 14, 2012)

This case is before the Court on the application of the Equal Employment Opportunity Commission (the "EEOC" or "Commission") for an Order to Show Cause Why an Administrative Subpoena Should not be Enforced. The EEOC is currently investigating charges of

sex and disability discrimination filed against McLane Sunwest, a division of McLane Company, Inc., ("Respondent") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") and the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§12101 *et seq.* ("ADA"). In the course of its investigation, the EEOC issued administrative Subpoena No. PHX-11-32 seeking documents relating to the investigation. The Respondent to date has produced some data and documents but has failed to produce other pertinent information and that failure has delayed and hampered the investigation of the charges. The EEOC therefore applies to this Court to issue an Order to Show Cause Why the Subpoena Should not be Enforced.

FACTUAL BACKGROUND

On January 7, 2008, Damiana Ochoa ("Charging Party") filed a charge (Charge No. 540-2008-01093 or "Ochoa Charge") with the EEOC alleging Respondent violated Title VII and the ADA by discriminating against her on the basis of sex and disability. (Exhibit A, Declaration of Elizabeth Cadle, Deputy District Director ("Cadle Decl.") ¶ 5 & Attachment 1 thereto). Charging Party asserted that Respondent violated Title VII and the ADA by requiring her to pass a physical capability exam "PCE," which is also referred to as the "Industrial Physical Capability Strength Test," "IPCS," or "IPCS PCE," upon her return from maternity leave. Charging Party, who had been employed by Respondent for eight years, was terminated from employment

when she did not pass the test. Charging Party further alleged that Respondent violated the ADA by requiring every employee returning to work from medical leave, and all new hires, to take, and pass the IPCS test before employment could commence.

The EEOC commenced investigation of Charge No. 540-2008-01093. During the course of its investigation, the EEOC discovered that Respondent made use of the IPCS test in its Grocery and Food Services divisions, nation-wide. Because the EEOC had reason to believe that the IPCS test may also result in discrimination on the basis of age, on August 6, 2010, the EEOC notified Respondent that the Director of the Phoenix District Office, Rayford 0. Irvin, had directed that a nation-wide investigation commence regarding Respondent's compliance with the Age Discrimination in Employment Act of 1967 ("ADEA"). (Ex. A, Cadle Decl. ¶ 13, and Attachment 9, thereto). On this same date, the EEOC provided Respondent with a consolidated Request for Information seeking information and documents for both the ADEA Directed Charge and the Ochoa Charge. *Id.*

On September 6, 2010, the EEOC received a second charge of discrimination against Respondent alleging discrimination based on disability. This charge was filed with both the EEOC and the California Department of Fair Employment and Housing. The Charging Party, employed eleven years by Respondent, alleged that he was discriminated on the basis of his disability when Respondent required him to take an

isokinetic test (IPCS test) upon his return from medical leave. Charging Party was terminated thereafter because he did not pass the test.

In November 2010, the EEOC notified Respondent that it was separating its consolidated Request for Information and issuing a separate Request for Information under the ADEA than under Title VII/ADA. The Commission further notified Respondent that it was conducting a nation-wide investigation of the Ochoa charge. (Ex. A, Cadle Decl. ¶ 15, and Attachment 10, thereto). Subsequently, on February 15, 2011, the EEOC issued administrative Subpoena No. PHX-11-32 in the Ochoa Charge. Respondent in turn, filed a Petition to Revoke or Modify Subpoena PHX-11-32.

In the Petition to Revoke subpoena PHX-11-32, Respondent specifically objected to the subpoena on the grounds that it was almost identical to the subpoena that was issued in the EEOC's ADEA Directed Charge. In addition, Respondent objected to the subpoena request for employee lists with names, last known addresses, phone numbers, and social security numbers because it would require Respondent to compile data, and the request was irrelevant, overbroad, unduly burdensome, confidential, an abuse of process, and issued solely to harass Respondent.

On August 9, 2011, the EEOC received another charge of discrimination against Respondent. The Charging Party alleged that Respondent discriminated against her on the basis of sex, disability, and age by terminating her employment when she was

unable to pass a physical strength test administered upon the end of her medical leave.

On August 24, 2011 the EEOC and Respondent met and conferred in an attempt to resolve disputes regarding some of the information sought in the subpoena. (Ex. A, Cadle Decl. ¶ 22, and Attachment 12, thereto). The category of essential information that both the EEOC and Respondent were not able to reach agreement on and which to this date have still not been produced to the EEOC fall into two categories. The first category encompasses lists of employees and applicants who have been terminated, demoted, or not hired because they failed the IPCS test, including their names, last known addresses, phone numbers and social security numbers (Request Nos. 10, 11a, 14, 15). The second category concerns data of employees and applicants who took the test, including:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

g. date of hire (or promotion), and job classification at hire (or promotion)

> h. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)
>
> i. position held at the time test was administered (for individuals employed at the time or returning to work)
>
> j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)
>
> k. reason why test was administered to each person tested
>
> l. date and reason for termination (if applicable)

(Request Nos. 8a-1). On March 21, 2012, the EEOC issued its final determination denying Respondent's Petition to Revoke or Modify Subpoena No. PHX-11-32, and directing Respondent to provide the requested information within twenty days. (Ex. A, Cadle Decl. ¶ 23, and Attachment 14, thereto). Although Respondent has produced some information to the EEOC, such as data regarding gender and test scores of employees and applicants in the grocery division, it has not provided essential information, such as the names, identities, and contact information of the employees and applicants who were required to take the test. More specifically, to date, Respondent has not provided lists of employees and applicants who have been terminated, demoted, or not hired because they failed the

IPCS test and has not provided the name, social security number, last known address, phone number, medical condition, information regarding position held, date and reason for termination of individuals who took the IPCS test. Additionally, in a letter dated May 10, 2012, Respondent advised the EEOC that the data it had produced contained errors relating to "de-duplication" of duplicate entries for test-takers who took the IPCS PCE multiple times and that these errors may "impact [the EEOC's] analysis as well." ((Ex. A, Cadle Decl. ¶ 24, and Attachment 15, thereto).

LEGAL ARGUMENT

EEOC subpoena enforcement proceedings are summary in nature and involve only limited judicial review. *EEOC v. Fed. Ex. Corp.*, 558 F.3d 842, 848 (9th Cir. 2009) *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001). To successfully petition a court to enforce an administrative subpoena, the Commission needs only to show that 1) the subpoena is within the agency's authority; 2) whether procedural requirements have been followed; and 3) the information sought is relevant to the investigation. *Id.*; *see also Univ. of Pa v. EEOC*, 493 U.S. 182, 191 (1990); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 72 n.26 (1984); *Karuk Tribe*, 260 F.3d at 1076. As the following discussion illustrates, the Commission has satisfied all of these requirements, therefore, the subpoena should be enforced.

1. The subpoena is valid and within the agency's authority.

Subpoena PHX-11-32 is valid and within the EEOC's authority to issue. Congress has authorized, and indeed mandated, that the EEOC investigate charges of discrimination alleging violations of the ADA and Title VII. 42 U.S.C. §12117(a) (incorporating 42 U.S.C. § 2000e-5(b)). Congress has imposed broad powers of access to records of those entities against whom charges have been filed, 42 U.S.C. § 2000e-8(a) (incorporated by 42 U.S.C. § 12117(a)), including the authority to subpoena evidence in an investigation, 29 U.S.C. §161 (incorporated into Title VII by 42 U.S.C. § 2000e-9 which in turn is incorporated into the ADA by 42 U.S.C. § 12117(a)). The EEOC is investigating the Charging Party's allegations that Respondent engaged in sex and disability discrimination in violation of Title VII and the ADA. Such an investigation is within the agency's authority. Thus, the first prong of the test has been satisfied.

2. EEOC has fulfilled all of its own procedural prerequisites in issuing the subpoena.

A valid charge has been filed and the subpoena contains all the information required by the EEOC's regulations. See 29 C.F.R. § 1601.16(a) (elements of subpoena)[1]. See also *EEOC v. Shell Oil Co.*, 466 U.S. 54,

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[1] 29 C.F.R § 1601.16(a) states, in relevant part:

The subpoena shall state the name and address of its issuer, identify the person or evidence subpoenaed, the

67-74 (1984) (addressing requirements of valid charge); 29 C.F.R. § 1601.12 (same). The Respondent does not and could not allege that these basic requirements have not been met.

3. EEOC has satisfied the broad relevancy requirements in an administrative subpoena.

The information sought by subpoena PHX-11-32 is relevant to the issues of sex and disability discrimination under investigation. The concept of relevancy during an EEOC investigation is broader than it is during litigation. Section 709(a) broadly grants the EEOC access to "any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a) (incorporated by 42 U.S.C. § 12117(a)). "[C]ourts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984). The Ninth Circuit has ruled that the scope of information considered relevant under this standard is "quite broad." *EEOC v. Recruit U.S.A. Inc.*, 939 F.2d 746, 756 (9th Cir. 1991). In

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person to whom and the place, date, and the time at which it is returnable or the nature of the evidence to be examined or copied, and the date and time when access is requested. A subpoena shall be returnable to a duly authorized investigator or other representative of the Commission.

addition, the commission does not need to present a "specific reason for disclosure" of the requested information, *Univ. of Pa. v. EEOC*, 493 U.S. 182, 194 (1990), and courts will defer to the agency's appraisal of relevance so long as it is not "'obviously wrong.'" *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 113 (4th Cir. 1997) (quoting *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992). The information sought by the EEOC without a doubt "might cast light on the allegations against the employer." *Shell Oil Co.*, 466 U.S. at 68-69.

A. Contact Information Is Necessary to Identify Disabled Employees and Applicants Who Took the IPCS Test.

To investigate whether the IPCS test violates the ADA, the EEOC needs to contact applicants and employees to identify individuals with disabilities and conduct data analysis regarding the test performance of those individuals. Thus far, Respondent has failed to provide information regarding the medical conditions or disabilities of applicants and employees who took the IPCS test. Additionally, because information regarding the disabilities of some individuals may not be readily apparent to Respondent, the EEOC needs to contact test takers to obtain specific information. Ms. Ochoa alleged in her Charge of Discrimination that the IPCS test is given to all employees returning to work from medical leave as well as new hires and violates the ADA. At least two other McLane employees have also filed Charges of Discrimination under the ADA

alleging that they were discriminated against on the basis of disability when they were required to take the IPCS test following their return from medical leave. Identifying and contact information for test-takers is highly relevant and essential to the Commission's ability to investigate whether Respondent's use of the IPCS test violates the ADA.

B. Identifying and Contact Information Is Necessary to Properly Investigate the Claims of Putative Class Members.

Contact and identifying information is also necessary to identify the putative class of women and disabled individuals who were subjected to adverse employment action because of their test scores. Additionally, the EEOC needs contact information for these women and disabled individuals to obtain specific information about the adverse actions taken against them and determine each individual's potential damages. With respect to disabled individuals, the Commission also needs to talk to these individuals to find out whether and what kind of accommodations were provided under the ADA if they failed to pass the test following a medical leave or during the application process.

C. Recent Case Law Subjects EEOC To A Possible Claim That It Failed To Exhaust Administrative Prerequisites If It Does Not Identify Putative Class Members During Its Investigation.

Recent case law supports an argument that EEOC is obliged to identify and investigate the claims of all potential class members prior to filing a lawsuit. *See E.E.O.C. v. CRST Van Expedited, Inc.*, 2012 WL 1583026, *10, Nos. 09-3764, 09-3765, 10-1682 (8th Cir. Feb. 12, 2012); *State ex rel. Terry Goddard, Attorney General v. Geo Group, Inc.*, Civil Action No. CV 10-1995-PHX-SRB, *18-19 (D. Ariz. Apr. 12, 2012) (unpublished) (attached hereto as Exhibit B). Given such holdings, the EEOC must obtain contact information for individuals who may have been subject to systemic discrimination during an early phase of its investigation. Otherwise, if the EEOC were to later find reasonable cause to believe that discrimination occurred, it might not be able to seek relief on behalf of individuals it was unable to identify. Although not binding on this Court, such case law suggests that identifying information and the ability to interview putative class members, if not essential, is at least relevant to any EEOC investigation involving potential systemic or class-based claims.

D. Social Security Numbers Are Unique Identifiers, Which Are Necessary To More Accurately Analyze Data and Link Data Across Databases.

Social security numbers of test-takers are also relevant, *inter alia*, because they are unique identifiers which are necessary to more accurately analyze and link data. When conducting data analysis, it is important to use unique identifiers to analyze and link data. A unique identifier such as a social security number is a value that allows a given individual to be identified within a given database and clearly distinguished from other individuals within that database. This value also allows data for a given individual to be linked across databases. IPCS, the company that administers the IPCS PCE test to McLane applicants and employees, uses social security numbers to identify and distinguish test-takers in its databases. McLane itself also uses social security numbers to identify and differentiate between employees in its databases. However, McLane has removed social security numbers (as well as names and other identifying information) from the data it has produced to the EEOC. Although the data produced by McLane includes "employee identification numbers," these numbers were recently created by McLane to respond to the EEOC's subpoena and the EEOC cannot confirm whether they are truly unique. The utilization of social security numbers as a unique identifier allows for accurate identification of individuals who have taken the IPCS

PCE on more than one occasion reliably in [sic] way that an employee identification number may not.[2]

In fact, in recent correspondence, McLane has admitted that the data it has produced to the EEOC is subject to errors relating to "de-duplication." (Ex. A, Cadle Decl. ¶ 24, and Attachment 15, thereto.) With a truly unique identifier such as a social security number, a test taker's different attempts to take the IPCS test can easily be determined. Unlike social security numbers, which are known to be unique, the employee identification numbers assigned by Respondent's Counsel are prone to errors. As such, the Commission requests social security numbers be provided in order to ensure that individuals within the multiple data sources can be uniquely identified and their data linked across multiple sources.

4. The Subpoena Is Not Unduly Burdensome.

Respondent objects to the subpoena because it will require data compilation that is unduly burdensome, overbroad and irrelevant. First, Respondent argues that the EEOC subpoena will require Respondent to create, produce and compile information, electronic or otherwise, causing it a significant monetary expense, and that this is unduly burdensome. The Commission,

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[2] Extant academic literature concerning the statistical analysis of adverse impact indicates that the issue of repeat applicants should be taken into consideration when conducting such analyses. Eric M. Dunleavy et al., *On the consequences of frequent applicants in adverse impact analyses: A demonstration study*, INT'L J. OF SELECTION & ASSESSMENT, 16(4), 333-344 (2008).

however, has the right to subpoena "[t]he production of evidence, including but not limited to, books, records, correspondence, or documents." 1 *EEOC Compliance Manual* § 24.4(a) (5/92); *see also* 29 C.F.R. § 1601.16(a)(2). In addition, courts have consistently required respondents to compile information and have held that the "EEOC may compel an employer to compile information within its control in order to respond to a subpoena, and the subpoena power of the EEOC is not limited to production of documents already in existence." *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1039 (10th Cir. 1993); *EEOC v. Md. Cup Corp.*, 785 F.2d 471, 478 (4th Cir. 1986); *see also Shell Oil Co.*, 466 U.S., at 68-69.

Moreover, the Ninth Circuit has required an employer to respond to requests requiring compilation of information. *EEOC v. Fed. Ex. Corp.*, 558 F.3d 842, 854-56 (9th Cir. 2009) (FedEx required to respond to subpoena and identify computerized databases in which it maintains employee information), adopting the analysis in *EEOC v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 114 (4th Cir. 1997). In addition, a court will not excuse compliance with a subpoena on the grounds of burdensomeness unless the respondent establishes that compliance seriously threatens to disrupt or hinder the normal operation of a business. *EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642, 648 (7th Cir. 1995). "There is a presumption in favor of requiring an employer's compliance with a subpoena when the Commission inquires into legitimate matters of public interest." *EEOC v. Konica Minolta Bus. Solutions U.S.A.*

Inc., 639 F.3d 366, 371 (7th Cir. 2011). And conclusory allegations that it would be burdensome to respond to the subpoena are not sufficient to meet the Respondent's burden. *Id.*

Respondent has not shown how the compilation of information such as the contact and identifying information for putative class members will add a burdensome cost to its normal operating costs. In *Maryland Cup*, the court found that it was not unduly burdensome for the Respondent to have to pay $75,000 to compile the requested information because employer did not show that this cost was burdensome in light of normal operating costs or that the gathering of information would threaten operations. 785 F.2d at 479. Here, Respondent states that the compilation and production of the information requested would impose a "significant monetary expense" on it, but it does not provide a specific estimate of the cost nor does it compare this cost to its normal operating expenses. Moreover, it was more burdensome for McLane to withhold social security numbers, names, and other identifying information from the IPCS data, than to produce that information.

5. The Commission Has Investigative Authority to Consolidate and Coordinate Its Investigation of Different Charges.

Respondent objects that subpoena PHX-11-32 issued in this charge is identical to the subpoena issued in the ADEA Directed Charge. However, consolidation

and coordination of investigations is within the authority of the Commission, and in fact the Compliance Manual explicitly recognizes that it might be necessary. The Compliance Manual specifically states:

> (e) Consolidation or Coordination of Charges—In deciding whether to consolidate or co-ordinate the investigation of two or more charges, consider whether personal harm and the immediate work environment are similar, whether there is otherwise a *common thread* to the allegations, or whether other factors exist which make consolidation or coordination practical.

1 *EEOC Compliance Manual*, § 2.7(e) (5/92) (emphasis added). The issue is not whether overlapping information is requested, but whether the information sought in this charge is within the EEOC's investigative authority and is "relevant to the charge under investigation." Section 709(a), 42 U.S.C. § 2000e-8(a).

Here, the Commission initially coordinated the investigation of this charge and the ADEA Directed Charge by issuing one Request for Information seeking information for both charges. Because both the underlying charge here and the ADEA Directed Charge related to Respondent's use of the IPSC [sic] test, and the test is administrated nationwide, there was a common thread to both charges. The Commission, thereafter, reconsidered its decision and separated the requests. Although the Requests for Information are separated, the Commission has the discretion to seek similar information in both charges as it continues its

investigation because both charges relate to Respondent's use of the same IPCS test.

Additionally, the information sought in the two subpoenas is not identical, and cannot be identical because the information relates to different protected categories. The subpoenas, however, do seek similar information because both charges deal with the discriminatory nature of Respondents testing policies and practices. The Ochoa Charge specifically alleges that Respondent's testing practices are discriminatory based on sex and disability, and so information regarding the implementation of testing policies falls squarely within the EEOC's authority to investigate the charge.

6. The EEOC Is Bound By Law To Maintain The Confidentiality Of Material Produced In Investigation.

Respondent objects to the production of documents and information due to confidentiality concerns. However, Courts have held that "confidentiality is no excuse for noncompliance" with an EEOC subpoena because of the criminal penalties imposed on EEOC personnel who publicize information obtained in the course of investigating charges of employment discrimination. *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 312 (7th Cir. 1981) (citing 42 U.S.C. § 2000e-5(b), 42 U.S.C. § 2000e-8(e) (incorporated by 42 U.S.C. § 12117(a)), *see also EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 604 (1981) (Respondent does not have categorical

right to refuse to comply with the EEOC subpoena based on concerns that the information supplied would not be held in absolute secrecy).

The plain statutory language of the Title VII requires the EEOC not to disclose any information obtained in the investigation phase. 42 U.S.C. § 2000e-8(e) (incorporated by 42 U.S.C. § 12117(a)). "Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year." *Id.* Therefore, during the investigation stage, the Commission is bound by law to protect the privacy rights of Respondent and its employees in the information produced. Failure to do so subjects the EEOC employees to fines and possible imprisonment. In order to comply with this law, the EEOC regularly insures the confidentiality of the information by redacting social security numbers, dates of birth, and other confidential or privileged information when responding to Freedom of Information Act requests. Thus, confidentiality is not a valid basis for a party to refuse to comply with an EEOC subpoena.

7. Respondent's Characterization Of The Subpoena As An Abuse Of Process Is Unfounded.

Respondent asserts in its petition that the EEOC subpoena is an abuse of process. However, it has not provided evidence to meet the high burden of show

that the EEOC abused its discretion in issuing this administrative subpoena. The Ninth Circuit has ruled that the scope of information that the EEOC can obtain through an administrative subpoena is "quite broad." *EEOC v. Recruit U.S.A. Inc.*, 939 F.2d 746, 756 (9th Cir. 1991). In *EEOC v. Recruit*, the Ninth Circuit stated "We therefore decline the companies' invitation to straitjacket the EEOC into an artificially narrow survey of Recruit's and Interplace's employment records. "'Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation.'" 939 F.2d at 756-757 (9th Cir. 1991) (citations omitted). The Tenth Circuit has also clarified:

> Although the Supreme Court has advised that the relevance standard must not be interpreted so broadly as to render the statutory language a "nullity," we have explained (1) that an EEOC administrative subpoena :is enforceable even though no 'probable cause' has been shown," (2) that even some request we "previously considered to be administrative *'fishing expeditions'* are often permitted," and (3) that such subpoenas "may be enforced for investigative purposes unless they are plainly incompetent or irrelevant to any lawful purpose."

EEOC v. Dillon Companies, 310 F.3d 1271, 1274-75 (10th Cir. 2001) (citations omitted) (emphasis added). As discussed above, the information sought by the EEOC is relevant to its investigation of the Respondent's administration of a nation-wide test that may be discriminatory.

Finally, Respondent alleges that the EEOC subpoena is issued solely to harass the Respondent but does not provide evidence for this allegation. Charging Party here, and at least two others, who have been employed with Respondent for a number of years have been terminated by Respondent after failing to pass a physical strength test administered after medical leave. The charges challenge a nation-wide testing policy that prohibits employees from returning from maternity and/or medical leave to commence work until they pass a strength test. This same policy affects new applicants who are interested in employment with Respondent, including individuals who may be disabled, from acquiring employment with Respondent. The result of these practices by Respondent affects the public interest. Therefore the EEOC's investigation is both warranted and justified.

CONCLUSION

For the foregoing reasons, the Court should enforce the EEOC's subpoena PHX-11-32. The subpoena seeks information relevant to a valid charge of discrimination that is within the EEOC's investigatory authority. The Commission therefore urges the Court to issue the accompanying proposed Order to Show Cause, and, after giving the Respondent an opportunity to be heard, enforce the subpoena.

RESPECTFULLY SUBMITTED this 14th day of August, 2012.

MARY JO O'NEILL
Regional Attorney

ANDREA G. BARAN
Supervisory Trial Attorney

/s/ Meenoo Chahbazi
MEENO CHAHBAZI
Trial Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
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Phoenix, Arizona 85012

Attorneys for Plaintiff

[Certificate Of Service Omitted]

[Doc. 2-1]

EXHIBIT A

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Andrea G. Baran, MO Bar No. 46520
Meenoo Chahbazi, DC Bar No. 494651
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Attorneys for Petitioner

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc. Respondent.	)	Case No. **DECLARATION OF ELIZABETH CADLE IN SUPPORT OF APPLICATION FOR ORDER TO SHOW CAUSE WHY AN ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, Elizabeth Cadle, solemnly state as follows:

1. I am the Deputy District Director of the Phoenix District Office of the Equal Employment Opportunity Commission ("EEOC"), and, in that role, I am responsible for the investigation of charges of employment discrimination.

2. The Phoenix District Office is responsible for investigating charges that employers have engaged in employment practices made unlawful by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the Americans with Disabilities Act of 1990 as amended, 42 U.S.C. §§ 12101 *et seq.* (ADA).

3. Among the EEOC'S investigative files in the Phoenix District Office is the charge file for Charge No. 540-2008-01093, filed against McLane Sunwest by Charging Party Damiana Ochoa. McLane Sunwest is a facility operated by McLane Company Inc., ("Respondent").

4. I state the following based on my personal examination of the files for Charge No. 540-2008-01093 as well as other ADA and Title VII charges of discrimination filed against Respondent and an ADEA Directed Investigation of Respondent.

5. On January 7, 2008, the EEOC's Phoenix District Office received Charge 5402008-01093 ("Ochoa Charge"), filed by Charging Party alleging that she

was discriminated against on the basis of sex and disability in violation of Title VII and the ADA. Charging Party Damiana Ochoa alleges that when she returned from maternity leave, Respondent terminated her employment, after she had worked for Respondent for over eight years as a Cigarette Selector, because she could not pass an agility test referred to as the Industrial Physical Capability Strength Test or "IPCS" test. Ms. Ochoa alleged that Respondent discriminated on the basis of sex, including pregnancy, and that Respondent discriminated against disabled employees and new hires by requiring them to pass the IPCS test before they could return to work after a medical leave or begin work as a new employee. (Attachment 1).

6. On January 11, 2008, the EEOC served the Respondent with notice of Charge 540-2008-01093 and requested a response from Respondent by February 11, 2008. (Attachment 2).

7. On April 25, 2008, Respondent submitted its Position Statement to the EEOC. (Attachment 3).

8. On August 24, 2009 the EEOC sent correspondence to Respondent seeking more information to supplement the Position Statement submitted by Respondent, with a response due by September 18, 2009. (Attachment 4). Among other requests, the EEOC requested that Respondent provide identifying information for individuals who took the IPCS test including their names, genders, last known addresses and phone numbers.

9. On September 17, 2009, Respondent requested an extension until October 19, 2009 in order to provide documents to the EEOC to supplement its Position Statement. (Attachment 5).

10. On October 16, 2009, Respondent once again requested an extension in order to supplement its Position Statement. (Attachment 6).

11. On November 9, 2009, Respondent requested an extension until November 13, 2009 to supplement its Position Statement. (Attachment 7).

12. On November 13, 2009, Respondent provided some of the information requested by the EEOC, but failed to provide identifying information for individuals who took the IPCS test including their names, last known addresses and phone numbers. (Attachment 8).

13. On August 6, 2010, the EEOC notified Respondent that it was commencing a nation-wide investigation into Respondent's compliance with the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq* ("ADEA"). Enclosed in this notification was a consolidated Request for Information for both the ADEA Directed Charge, Charge No. 540-2010-01761, and the Title VII and ADA Charge (Ochoa Charge), Charge No. 540-2008-01093 with responses due by September 6, 2010. (Attachment 9).

14. On September 6, 2010, the EEOC received another charge of discrimination against Respondent. In this Charge, the charging party alleged he was discriminated against by Respondent on the basis of

disability when he was terminated from work because he failed an isokinetic test (IPCS). In order to return to work after his medical leave, he was required to take and pass the IPCS test. This Charge was filed with both the EEOC and the California Department of Fair Employment and Housing.

15. On November 9, 2010, the EEOC informed Respondent that it had separated its consolidated Request for Information for the ADEA and Title VII/ADA charges. (Attachment 10). The EEOC also notified Respondent that it was expanding its Title VII and ADA investigation to all of Respondent's facilities nationwide. Attached to this notification was a Request for Information for the Title VII and ADA charge with response due no later than December 1, 2010. (Attachment 10).

17. On January 14, 2011, Respondent submitted its response to the Request for Information in the Title VII/ADA charge. (Attachment 11). Although Respondent provided some of the information requested, it did not provide several categories of important information.

19. On February 15, 2011, the EEOC issued Subpoena No. PHX-11-32 in its Title VII, and ADA investigation of Respondent, with response due no later than March 11, 2011. (Attachment 12).

20. On February 22, 2011, Respondent submitted to the EEOC a Petition to Revoke or Modify Subpoena PHX-11-32. (Attachment 13).

21. On August 9, 2011, the EEOC was made aware of yet another charge of discrimination against Respondent and its use of the IPCS test. The Charging Party alleged that Respondent discriminated against her on the basis of gender, disability and age by requiring her to take the IPCS test upon her return from a medical leave of absence. This Charging Party was terminated from employment when she failed to pass the test.

22. The EEOC and Respondent met and conferred on August 24, 2011 to resolve any disagreements related to subpoena PHX-11-32. The parties could not agree on two categories of requested information. The two categories are: (1) lists of employees and applicants who were terminated, demoted, or not hired because they failed to pass the IPCS test, including names, last known addresses, phone numbers, and social security numbers for those employees and applicants (Request Nos. 10, 11a, 14, 15), and (2) identifying data regarding employees and applicants who took the test (Request No. 8a-1). (Attachment 12).

23. On March 21, 2012 the EEOC issued a determination, denying Respondent's Petition to Revoke or Modify Subpoena PHX-11-32. The determination directed Respondent to provide the requested information to the EEOC within 20 days. (Attachment 14).

24. In a letter dated May 10, 2012, Respondent advised the EEOC that the data it had I produced contained errors relating to "de-duplication" of duplicate

entries for test-takers who took the IPCS PCE multiple times and that these errors may "impact [the EEOC's] analysis as well." (Attachment 15).

25. As of the date of this Declaration, Respondent has failed to provide the EEOC with many categories of requested information. Specifically, Respondent has not provided the names of employees and applicants, their social security numbers, addresses, and phone numbers. It has also failed to provide information regarding the medical condition, dates of application or hire, the job classification at the time of hire, position held by employee at time test was administered, and the date and reason for termination.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Elizabeth Cadle
Elizabeth Cadle

Date: August 14, 2012.

[Doc. 2-1]

EXHIBIT 1

CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.	Charge Presented To: ☐ FEPA ☒ EEOC Agency(ies) Charge No(s): **540-2008-01093**

Arizona Attorney General's Office, Civil Rights Division and EEOC
State or local Agency, if any

Name *(indicate Mr., Ms., Mrs.)* **Ms. Damiana Ochoa**	Home Phone No. *(Incl. Area Code)* **(623) 444-0257**	Date of Birth **02-22-1977**
Street Address **7026 W. Earll Drive, Phoenix, AZ 85033**	City, State and ZIP code	

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name **MCLANE SUNWEST**	No. Employees, Members **201 – 500**	Phone No. *(Include Area Code)* **(623) 935-7500**

Street Address	City, State, and ZIP Code
14149 W. McDowell Rd., Goodyear, AZ 85395	

Name	No. Employees, Members	Phone No. *(Include Area Code)*

Street Address	City, State, and ZIP Code

DISCRIMINATION BASED ON *(Check appropriate box(es).)*	DATE(S) DISCRIMINATION TOOK PLACE
☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ RETALIATION ☐ AGE ☒ DISABILITY ☐ OTHER *(specify below.)*	Earliest Latest **01-01-2008** ☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*

On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (Physical Capability Strength Test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007 and December 28, 2007, I re-tested and did not pass. I have worked for the above-named employer for over 8 years as a cigarette Selector.

I believe I have been discriminated against because of my sex, female (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.

The Physical Capability Strength Test is given to all employees returning to work from a medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.	NOTARY—*When necessary for State and Local Agency Requirements*
I declare under penalty of perjury that the above is true and correct **Jan 07, 2008** *Date* Damiana Ochoa *Charging Party Signature*	I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. SIGNATURE OF COMPLAINANT SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (*month, day, year*)

[Doc. 2-1]

EXHIBIT 2

EEOC FORM 131 (5/01)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Human Resources Director **MCLANE SUNWEST** **14149 W. Mcdowell Rd.** **Goodyear, AZ 85395**	PERSON FILING CHARGE **Damiana Ochoa**
	THIS PERSON *(Check one or both)* ☒ Claims To Be Aggrieved ☐ Is Filing on Behalf of Other (s)
	EEOC CHARGE NO. **540-2008-01093**

NOTICE OF CHARGE OF DISCRIMINATION
(See the enclosed for additional information)

This is notice that a charge of employment discrimination has been filed against your organization under:

☒ Title VII of the Civil Rights Act
☒ The Americans with Disabilities Act

☐ The Age Discrimination in Employment Act
☐ The Equal Pay Act

The boxes checked below apply to our handling of this charge:

1. ☐ No action is required by you at this time.

2. ☐ Please call the EEOC Representative listed below concerning the further handling of this charge.

3. ☒ Please provide by FEB 11 2008 a statement of your position on the issues covered by this charge, with copies of any supporting documentation to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.

4. ☐ Please respond fully by to the enclosed request for information and send your response to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.

5. ☒ EEOC has a Mediation program that gives parties an opportunity to resolve the issues of a charge without extensive investigation or expenditure of resources. If you would like to participate, please say so on the enclosed form and respond by **25-JAN-08** to **Yvonne Gloria-Johnson, ADR Coordinator, at (602) 640-5022**

If you *DO NOT* wish to try Mediation, you must respond to any request(s) made above by the date(s) specified there.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Deanya B. Barlettt, **ADR Staff Mediator** *EEOC Representative* *Telephone* **(602) 640-5046** Enclosure(s): ☒ Copy of Charge	**Phoenix District Office** **3300 North Central Ave** **Suite 690** **Phoenix, AZ 85012**

CIRCUMSTANCES OF ALLEGED DISCRIMINATION

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGINAL ☐ AGE ☒ DISABILITY ☐ RETALIATION ☐ OTHER

See enclosed copy of charge of discrimination

Date	Name/Title of Authorized Official
JAN 11 2008	**Chester V. Bailey** **District Director**

Signature

/s/ Chester V. Bailey

[Doc. 2-1]

EXHIBIT 3

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
Phoenix, Arizona 85004-2202
602.382.6000
602.382.6070 (Fax)
www.swlaw.com

Ashley T. Kasarjian
602-382-6544
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DENVER
LAS VEGAS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

April 25, 2008

VIA HAND-DELIVERY

Barbara Rusden, Investigator
Equal Employment Opportunity Commission
Phoenix District Office
3300 North Central Avenue, Suite 690
Phoenix, Arizona 85012

Re: *Charge No.:* *540-2008-01093*
Charging Party: *Damiana Ochoa*
Respondent: *McLane Sunwest, Inc.*

Dear Ms. Rusden:

As previously advised, this law firm represents the Respondent, McLane Sunwest, Inc. (hereinafter referred to as "McLane") in the above-referenced matter. This letter constitutes McLane's position statement in response to the Charge of Discrimination filed by Damiana Ochoa (hereinafter "Charging Party").

McLane reserves the right to object to the admissibility of this submission in any subsequent litigation. This letter constitutes a response to an agency request for information only. Additional facts may be discovered under Federal or State Rules of Procedure in any subsequent litigation.

I. THE CHARGE

Charging Party filed a Charge of Discrimination against McLane on January 7, 2008 alleging that she was discriminated against because of her sex (female) and alleged disability (pregnancy). *See* Charge of Discrimination, attached as Exhibit 1. McLane denies the allegations in their entirety and, as the facts below make clear, submits that Charging Party has not been discriminated against in any way.

II. MCLANE SUNWEST

McLane Sunwest is a grocery distribution center located in Goodyear, Arizona. Since opening this division of McLane Company, Inc. in 1985, it has provided services to its customers located in Arizona, Nevada, New Mexico and Texas. McLane has been, and remains, committed to developing dedicated, well-trained teams that are focused on excellence.

As an Equal Opportunity Employer, McLane prohibits discrimination in every aspect of the employment relationship. *See* EEO Policy (I-3), attached as Exhibit 2; and EEO Handbook Provision, attached as

Exhibit 3. Employees are encouraged to report any alleged discrimination to their Human Resources Manager, Division President, General Manager or Home Office representative. *Id.*

McLane also is committed to protecting the safety and health of all employees and ensuring an accident-free environment. *See* Safety Program (V-1), attached as Exhibit 4. To that end, McLane has an extensive training program, including pre-shift stretch and flex sessions, safety committees, and safety celebrations.

All employees are given a copy of the Teammate Handbook which provides information regarding various work guidelines, programs, and practices of McLane. Following her hire, Charging Party was given a copy of the Teammate Handbook. Charging Party acknowledged that she received and familiarized herself with the handbook. *See* Signed Receipt, attached as Exhibit 5.

III. FACTUAL BACKGROUND

McLane hired Charging Party as a Selector II/ Mezzanine Selector on May 30, 2000. *See* Employment Application, attached as Exhibit 6. In this position, Charging Party was required to perform various physical tasks, such as: (1) pulling stacks of 25 empty totes to staging area (which required up to 145 lbs. of force); (2) lifting totes off stacks and placing on roller belt; (3) pushing/pulling totes up or down the roller belt; (4) stocking shelves; (5) and lifting/lowering/carrying/

sliding 40 lb. wooden pallets. *See* Job Description, attached as Exhibit 7.

All such positions at McLane are assigned either the "Medium-Heavy" or "Heavy" category based upon the job requirements. *See* Job Categories with Lifting Specifications, attached as Exhibit 8; and Physical Demands Strength Definitions, attached as Exhibit 9. As a Selector II, Charging Party's position was in the less strenuous category—namely Charging Party's position required "Medium-Heavy" lifting. *Id.*

On June 25, 2007, Charging Party requested and was granted Family and Medical Leave for prenatal care and the birth of her child. *See* FMLA Request, attached as Exhibit 10; *see also* FMLA Policy, attached as Exhibit 11.[1] Charging Party took the requested FMLA leave, and on approximately October 31, 2007, she was ready to return to work and take the required "Return to Work" test.

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[1] As further evidence of the fact that McLane has not discriminated against Charging Party because of her pregnancy, she had previously requested and was granted FMLA leave for the birth of a child. Upon concluding her FMLA leave, she successfully completed the required "Return to Work" test, and was promptly reinstated.

A. Industrial Physical Capability Strength Testing

1. General Information Regarding "Return to Work" Testing

In order to ensure that employees are capable of safely performing their job, all newly hired employees, and employees returning from an absence of thirty days or more, are required to take the Industrial Physical Capability Strength Test (referred to as "the test" or "IPCS test").[2] *See* Pre/Post Employment Physical Requirements Policy at 2, attached as Exhibit 12; and Notice to All Applicants for Employment, attached as Exhibit 13. If an employee cannot meet the minimum requirements to pass the test, the employee may be given an opportunity to retest. *See* Physical Capability Services Manual at 11, attached as Exhibit 14. During this time, an employee is encouraged to work to enhance their overall physical capability.

Industrial Physical Capability Services, Inc. ("IPCS"), oversees the testing in order to ensure objectivity, validity, and reliability. Over the past thirty years, IPCS has provided its standardized capability assessments to numerous industrial clients in the trucking, distribution, airline, manufacturing and utility industries. The process utilized by IPCS has been

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[2] In 2007, only one other female took the IPCS "Return to Work" test at McLane's Sunwest location as a result of taking leave for pregnancy/childbirth. This employee passed the test and returned to work.

evaluated by Thomas G. Abram, a Shareholder at Vedder Price law firm, who has provided his independent opinion that IPCS testing conforms with Title VII, the ADA, the ADEA, Executive Order 11246 and all published regulations and guidelines relating to employment testing, including the Uniform Guidelines on Employee Selection Procedures. *See* January 14, 2005 Opinion Letter, attached as Exhibit 15.

In addition, numerous comparative studies have evaluated the effectiveness of IPCS testing on the reduction in the frequency and severity of injuries. For example, in a 16-month analysis of new employees who were evaluated by IPCS testing, there was a 70.5% reduction in the incident rate of injury. In another study, 14 food distribution locations took part in a 35-month study that concluded that there was a dramatic impact on the reduction of the frequency and severity of injuries.

2. The IPCS Testing Process

In order to match the physical capabilities of the worker to the physical demands of a particular job, a Job Task and Physical Activities Analysis is performed. This analysis determines the target physical capability score an employee will be required to meet to pass the test. *See* Sample Job Task Analysis Reports, attached as Exhibit 16. Thus, employees take the IPCS test that is specific to their position at McLane.

McLane employees go to an approved clinic, with trained IPCS providers, to take the standardized test

that is specific to their jobs and the corresponding GMSA Job Task Analysis. The test is then performed on an isokinetic machine that focuses on the major muscle groups of the shoulders and legs, as strength in these two areas is necessary when performing the essential functions of the job. *See* Manual at 11, attached as Exhibit 14. The machine allows a dynamic evaluation of specific movement patterns and accommodates an individual's weaknesses and strengths by providing resistance equal to the force applied against the machine.

IPCS analyzes the results of the test by applying a validated mathematical model that generates the IPCS physical capability index score. *Id.* at 11-12. After this evaluation, the results are sent directly to the employer, with details regarding the specific findings and the data used to produce the results. *See* Sample Results, attached as Exhibit 17.

IPCS testing is critical at McLane as the job positions are physically demanding. For example, a Selector II may pick approximately 2,300 pieces of product from racks to place in totes, filling 1,000 totes per shift. *See* Job Description, attached as Exhibit 7.[3]

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[3] The importance of such tests is underscored by Charging Party's own work history that includes a "Safety Intervention" for wrist and forearm pain. *See* Safety Intervention, attached as Exhibit 18; Injury Statement, attached as Exhibit 19; and "Supervisor's Accident/Incident Investigation Report" Regarding Gradual Pain, attached as Exhibit 20.

B. Charging Party's IPCS Testing

On November 11, 2007, Charging Party took the required IPCS test to return to work. *See* 11/1/07 IPCS Test Results, attached as Exhibit 21. She was required to meet the "Medium-Heavy" score requirement for her position, which is the lowest score requirement for a position at McLane. To pass the test, Charging Party was required to receive an IPCS score greater than 1.32 (which signifies the total torque divided by the body weight[4]). Charging Party received a score of .77. Based on this score, it was determined that Charging Party did not meet the minimum physical demands of the essential functions of the position and, thus, failed the test.

In the event an employee fails the first test, the employee is allowed to retest *one* time. *See* Pre/Post Employment Physical Requirements Policy at 2, attached as Exhibit 12.[5] Therefore, Charging Party was allowed to take the test for a second time. *See* 11/19/07 IPCS Test Results, attached as Exhibit 22. On November 19, 2007, Charging Party took the "Return to Work" test and received an IPCS score of 0.93. *Id.* Based on

---

[4] Body weight must be taken into account in the scoring, because muscle strength is required to support body weight, in addition to the muscle strength used to execute the job functions.

[5] An employee is also given the opportunity to apply for another available position for which he/she is qualified, provided he/she is able to pass the designated test. However, in this situation, Charging Party was already working in a position that had the *minimum* score requirement (of "Medium-Heavy"). Because Charging Party could not pass the IPCS test for her position, she would be unable to pass the test for *all* positions.

this score, Charging Party, again, did not meet the minimum physical demands of the essential functions of her position and failed the test.

Despite the policy providing only one retest, Charging Party was given the opportunity to take the exam a third time. On December 27, 2007, Charging Party took the test and failed for the third time. *See* 12/27/07 IPCS Test Results, attached as Exhibit 23. Notably, this time her score went down from her previous testing as she only scored 0.91. *Id.*

As a result of Charging Party's third failure, IPCS concluded that she was unable to meet the minimum qualifications to perform the essential functions of her job, and thus, in accordance with McLane's policies and procedures, her employment was terminated on January 9, 2008. *See* Change Document, attached as Exhibit 24.

IPCS TESTING RESULTS		
Date of IPCS Testing	**Charging Party's Score**	**Required Score for Selector Position**
11/11/2007	0.77	1.32
11/19/2007	0.93	1.32
12/27/2007	0.91	1.32

IV. LEGAL DISCUSSION

A. Disability Discrimination

In order to establish a *prima facie* case of disability discrimination, Charging Party must establish that: (1) she is disabled; (2) she is qualified, with or without accommodation, to perform the essential functions of the job; and (3) the Company terminated her because of her disability. *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 271 (9th Cir. 1996).

First, Charging Party has not established she has a qualifying disability under the ADA. In order to establish that she is disabled, Charging Party must show that she has "a physical or mental impairment which substantially limits one or more of the major life activities . . . " 42 U.S.C. § 12112(a). "Consistent with the EEOC's Interpretive Guidance, many courts have held that pregnancy, absent abnormal or unusual circumstances, is not a disability." *Gabriel v. City of Chicago*, 9 F.Supp.2d 974, 980 (Ill. 1998) (external citations omitted).

Moreover, even if Charging Party could establish that she was disabled under the ADA, she was unable to perform the essential functions of the job. In this case, "[t]he function [is] essential because the reason the position exists is to perform that function." *See* 29 C.F.R. § 1630.2(n)(2)(i). The Selector II position is categorized as "Medium-Heavy", which is the least physically demanding category at McLane. However, even so, Charging Party could not perform the essential

functions of the job, with or without an accommodation. Allowing her to perform a job which she is not capable of performing the essential functions would put her and other employees at risk of serious harm.

IPCS testing is applied equally to all applicants and employees returning from more than 30 days leave, regardless of the reason for that leave. An employee is given the standardized test specific to his or her position, and the results are analyzed by IPCS by applying a validated mathematical model that generates the IPCS physical capability index score. As such, Charging Party's claims of discrimination are without merit.

Without any evidence to support Charging Party's allegation of a discriminatory motive, the business judgment of the employer will not be second-guessed. *Foster v. Andersen, L.L.P.*, 168 F.3d 1029, 1035 (7th Cir. 1999) ("we do not sit as a super-personnel department that reexamines an employer's personnel decisions"); *Simms v. Oklahoma*, 165 F.3d 1321, 1330 (10th Cir. 1999) ("[o]ur role is . . . not to act as a 'super personnel department' that second guesses employers' business judgments").

B. Sex Discrimination—Title VII

In order to prevail on a charge of discrimination under Title VII, Charging Party must offer either direct evidence of discrimination or prove discrimination through the burden-shifting analysis identified in *McDonnell Douglas. McDonnell Douglas Corp. v. Green*,

411 U.S. 792 (1973). In order to produce specific evidence that her sex was the reason for the personnel decisions at issue, Charging Party cannot rely on mere speculation or her own subjective conclusions. The courts consistently have held that such conclusory allegations and subjective beliefs are "wholly insufficient evidence to establish a claim of discrimination as a matter of law." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (6th Cir. 1992).

In the instant matter, Charging Party offers no direct evidence of discrimination. Therefore, she must establish a *prima facie* case of discrimination by showing that: (1) she is a member of a protected class, (2) she was capable of performing her job in a satisfactory manner, (3) she suffered an adverse employment decision, and (4) she was treated differently on the basis of her pregnancy. *Ford v. Sheriff-Coroner's Dep't of Contra-Costa County*, 1998 WL 898468 (N.D. Cal. 1998).

If Charging Party can satisfy these elements, the burden of production shifts to McLane to articulate a legitimate, non-discriminatory reason for terminating Charging Party. *McDonnell Douglas*, 411 U.S. at 800-01. If McLane satisfies this burden of production, there is no presumption of discrimination, and thus, the ultimate burden is on Charging Party to prove that McLane's reason was merely a pretext for discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

1. *Charging Party Cannot Establish That She Was Terminated Based On Her Pregnancy*

Charging Party is unable to establish the requisite elements of her *prima facie* case of pregnancy discrimination. Even assuming Charging Party belonged to a protected class at the time of her termination, she cannot establish that she was either capable of performing her job as required or that she was treated differently based on her sex.

Every new hire and employee returning after 30 or more days of leave is required to take the IPCS "Return to Work" testing. "Return to Work" testing is common in this industry, as with others, to protect the employee's own safety since an employee must be physically capable of performing the essential functions of his or her position. *See e.g. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (the test should be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated"); *see also, Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (discussing validation of job-related tests).

IPCS testing is essential for the positions at McLane, which involve physical activities such as lifting/lowering, carrying, pushing/pulling, reaching, bending/twisting, crouching/stooping/squatting, crawling/kneeling, climbing/stepping, kicking, walking, standing, and sitting. *See, e.g., Porter v. State of Kan.*, 757 F.Supp.

1224, 1230-31 (D. Kan. 1991) (holding that the requirement that a psychiatric aide should be able to lift more than 40 pounds is facially-neutral with regard to pregnancy and even if there was an impact on pregnant women, it is justified by "business necessity").

Notably, Charging Party previously had taken a "Return to Work" test after a pregnancy, passed, and returned to her position. However, this time, Charging Party took and failed the test with the lowest weight classification ("Medium-Heavy") *three* times—indeed, one attempt more than typically allowed at McLane. Moreover, on her third attempt, her score went *down* from her second score. Charging Party was not capable of performing the essential functions of her job, and was not treated differently based on her sex.

2. *McLane Had Legitimate, Non-Discriminatory Reasons for Its Actions*

Even assuming Charging Party could establish a *prima facie* case, which she cannot, McLane had legitimate, non-discriminatory reasons for its actions. As evidenced by the discussion above, Charging Party has not shown that her termination was related to her pregnancy. Rather, McLane had a legitimate, non-discriminatory reason to support its decision.

Specifically, McLane has thoroughly documented and validated test results administered through a third party, IPCS. The isokinetic testing data is objectively evaluated and processed at the IPCS corporate office. Upon completion of the processing, the results are sent to McLane, which include the determination

as to whether the employee is capable of performing the essential functions of his or her position. Charging Party was given the opportunity to take the IPCS testing three times but failed each test. Further, all of Charging Party's scores were below the minimum IPCS score for her position.

Without any evidence to support Charging Party's allegations of a discriminatory motive, courts have repeatedly held that it is not the prerogative of a court or agency to second-guess management's business judgment or its decision that an employee's performance was unsatisfactory. *See Meching v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988); *Foster v. Arthur Anderson, L.L.P.*, 168 F.3d 1029, 1035 (7th Cir. 1999); *Simms v. Oklahoma Dept. of Mental Health*, 165 F.3d 1321, 1330 (10th Cir. 1999). McLane has the right to set legitimate performance expectations for its employees and to terminate those employees who fail to meet the standards.

V. CONCLUSION

For all of the foregoing reasons, McLane respectfully requests that a no-cause determination be issued.

Very truly yours,

Snell & Wilmer

/s/ Ashley Kasarjian
Joshua Woodard
Ashley Kasarjian

AK/ad
Attachments (Exhibits)

[Doc. 2-1]

EXHIBIT 4

[SEAL]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
(866) 408-8075
TTY (602) 640-5072
FAX (602) 640-5071

August 24, 2009

Ashley T. Kasarjian
Snell & Wilmer
One Arizona Center
Phoenix, AZ 85004-2202

Re: Damiana Ochoa v. McLane Sunwest
Charge No. 540-2008-01093

Dear Ms. Kasarjian:

Please respond to the following by September 18, 2009.

1. Submit a copy of any and all policies of Respondent that require any new hire and/or employee to take the Industrial Physical Capability Strength (IPCS) test, including any policy requiring an employee returning from leave in excess of 30 days to take the IPCS test. If actual practice is different from the written policy, describe actual practice.

2. Describe in detail how the results of the IPCS test are interpreted, including:

a. How are IPCS test results conveyed from the test administrator to Respondent?

b. What is the passing score for each job position for which the IPCS test is in use?

c. Who determines the score necessary to "pass" the IPCS test?

d. What methods are used in determining the score necessary to "pass" the IPCS test?

e. Provide the date on which the IPCS test was first administered to any employee or new hire (whether prospective or actual) of Respondent.

3. Submit copies of any and all validity studies conducted by the Respondent and/or Industrial Physical Capability Services in connection with use of the IPCS test and/or its results with respect to any employee or new hire (whether prospective or actual) of Respondent.

4. Submit copies of any and all correspondence between Respondent and Industrial Physical Capability Services in connection with use of the IPCS test and/or its results, including but not limited to instructions for interpreting test results, information regarding usage of the test, and contracts.

5. Submit an electronic database[1] identifying all individuals (whether employees, prospective new

---

[1] "Electronic database" shall mean a native electronic file submitted on a compact disc (CD-ROM) that can be opened and sorted by Microsoft Excel (such as Microsoft Excel Files (".XLS") and comma delimited files (".CSV")) wherein the first row of the

hires, or actual new hires) given the IPCS test from January 1, 2006 to present date at Respondent's direction. For each, provide the following information:

a. employee identification number;

b. first name;

c. last name;

d. date of hire;

e. date of birth;

f. gender;

g. reason for administration of the test;

h. date(s) of test;

i. indicate if the individual passed or failed;

j. position title;

k. last known home address and telephone numbers.

6. Provide a listing of all position titles and all position descriptions in use at Respondent's facilities from January 1, 2006 to the present.

---

database contains the field or variable names of the requested information and each subsequent row of the database shall contain the requested information for each individual identified. Image files (such as PDF or TIF files) and printed copies of the database do not satisfy this request.

7. Submit a complete copy of Charging Party's personnel file, including but not limited to any correspondence regarding the IPCS test administered to Charging Party.

8. Submit copies of any and all adverse impact analyses completed in conjunction with Respondent's employees or new hires who took the IPCS test from January 1, 2006 to present date.

9. Submit copies of any and all internal correspondence relating to, concerning, or memorializing Respondent's decision to implement, use, or discontinue the IPCS test.

10. Identify the facility where Charging Party took her IPCS test, including the provider name and location, and identify the person who administered the test to Charging Party.

11. Identify any and all individuals acting as liaison between Respondent and Industrial Physical Capability Services in connection with the IPCS test.

12. Submit an electronic database identifying all individuals employed by the Respondent from January 1, 2006 to present date. For each, provide the following information:

    a. employee identification number;

    b. first name;

    c. last name;

    d. date of hire;

    g. date of birth;

f. gender;

g. position title.

Thank you for your cooperation.

Sincerely,

/s/
Barbara Rusden
Investigator
(602) 640-5054

* * *

[Doc. 2-1]

EXHIBIT 8

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
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LOS CABOS
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Ashley T. Kasarjian
602.382.6544
akasarjian@swlaw.com

November 13, 2009

VIA HAND-DELIVERY

Barbara Rusden, Investigator
U.S. Equal Employment Opportunity Commission
3300 N. Central Avenue, Suite 690
Phoenix, Arizona 85012-2504

Re: *Damiana Ochoa v. McLane Sunwest*
Charge No. 540-2008-01093-2504

Dear Ms. Rusden:

In response to your request for additional information and documents, McLane Sunwest ("Respondent" or "McLane Sunwest") provides the following supplementation to the Position Statement it submitted on April 25, 2008 ("Position Statement"):

REQUEST NO. 1:

Submit a copy of any and all policies of Respondent that require any new hire and/or employee to take the Industrial Physical Capability Strength (IPCS) test, including any policy requiring an employee returning from leave in excess of 30 days to take the IPCS test. If actual practice is different from the written policy, describe actual practice.

RESPONSE TO REQUEST NO. 1:

See Respondent's Position Statement Exhibit 12, Pre/Post Employment Physical Requirements Policy; and Respondent's Position Statement Exhibit 13, Notice to All Applicants for Employment. Additionally, Respondent's policy related to its safety program was

provided at Respondent's Position Statement Exhibit 4. As emphasized in the safety policy, the safety and health of all its employees is a high priority for McLane Sunwest. In addition to the procedures outlined in the Pre/Post Employment Physical Requirements Policy, individuals may be permitted to take the IPCS test for a third time, in certain circumstances.

As indicated in the Pre/Post Employment Physical Requirements Policy, not all positions at McLane Sunwest require a functional capacity evaluation ("FCE"). Rather, a FCE is required only for those positions with essential functions that include physical tasks such as lifting, pushing, carrying, pulling and standing for long periods of time as determined through a job task evaluation. As noted in the Policy, if an individual is unable to successfully complete the FCE for the particular position, he/she may apply for another available position for which he/she is qualified. One of the qualifying criteria is the ability to pass the designated FCE, if such evaluation is necessary because of the essential functions of the position sought. If an individual does not meet the minimum physical demands to perform the essential functions of the job sought, McLane Sunwest will determine whether alternative positions exist for which the individual is qualified. For example, if an individual is not qualified for a job with Medium-Heavy physical requirements, he/she may be capable of performing a job with Medium physical requirements,

which is the least of the physically demanding positions at Respondent's facility.[1] Alternatively, McLane Sunwest considers whether an administrative position is available for which the individual is qualified. Because the essential functions of the job are not physically demanding, Respondent does not require individuals in administrative positions to participate in a FCE.

REQUEST NO. 2:

Describe in detail how the results of the IPCS test are interpreted, including:

a. How are IPCS test results conveyed from the test administrator to Respondent?

b. What is the passing score for each job position for which the IPCS test is in use?

c. Who determines the score necessary to "pass" the IPCS test?

d. What methods are used in determining the score necessary to "pass" the IPCS test?

---

[1] In Respondent's initial position statement, it was noted that Medium-Heavy was the minimum requirement for all positions at Respondent's facility. Upon further review, it is noted that there is one position, Inventory Control, with only Medium physical demands. However, this position is irrelevant to the analysis of this Charge of Discrimination because Charging Party's evaluation revealed that she was only qualified to perform jobs with Medium-Light physical requirements.

e. Provide the date on which the IPCS test was first administered to any employee or new hire (whether prospective or actual) of Respondent.

RESPONSE TO REQUEST NO. 2:

a. The IPCS test results are conveyed from IPCS to McLane Sunwest via email. *See* the summary of Charging Party's test results previously provided with Respondent's Position Statement, Exhibits 21-23. A sample test result form, with definitions of terms, was also provided with Respondent's Position Statement, Exhibit 17. Additionally, the IPCS Scheduling Manual provides sample reports and was submitted with Respondent's Position Statement, Exhibit 14.

b. The essential functions of each position are evaluated to identify the physical requirements for the specific job. For positions without physically demanding functions, no FCE is required. For those positions that are physically demanding, a Job Task Analysis ("JTA") is prepared detailing the physical requirements for performing the essential functions of the job.[2] The physical job requirements determine the correlating IPCS rating for the position. The passing scores specific to the observed physical requirements of the different positions are identified on the Physical

[2] Job functions are evaluated through direct, in-person observation and through measurement. For example, the Job Task Analysis for Mezzanine Selector (Exhibit 42) was developed through observation and analysis by a third-party job evaluator, General Management Solutions, Inc.

Demands Strength Definitions that was previously provided with Respondent's Position Statement, Exhibit 9. The physical demand ratings for those positions at McLane Sunwest that require an FCE are attached hereto as *Exhibit 25*.

c. Passing scores correlate to the physical demand ratings assigned based on the JTA. IPCS determines the numerical IPCS capability score that correlates with the physical requirements of the position.

d. Data management, processing and evaluation are conducted by IPCS. *See* the documentation attached to this correspondence as *Exhibit 26*, The IPCS Score—What Is It?; and *Exhibit 27*, Physical Capability Evaluation Proposal Presented to Company.

e. The IPCS evaluation was first administered on behalf of Respondent on October 25, 2006.

REQUEST NO. 3:

Submit copies of any and all validity studies conducted by the Respondent and/or Industrial Physical Capability Services in connection with use of the IPCS test and/or its results with respect to any employee or new hire (whether prospective or actual) of Respondent.

RESPONSE TO REQUEST NO. 3:

See the documentation attached to this correspondence as *Exhibit 28*, The Effectiveness of the IPCS Physical Capability Evaluation Process for McLane Food Service Company, A Validation Study; and *Exhibit 29*, An Injury Analysis To Determine the Effectiveness of the IPCS Physical Capability Evaluation (PCE) Program On Injury Claim Costs, McLane Company.

Additionally, IPCS undertakes regular and consistent validation and analysis. IPCS obtained legal opinions from Vedder Price based on the law firm's independent analysis of the validation studies conducted by IPCS. The January 14, 2005 opinion is provided at Respondent's Position Statement *Exhibit 15*. Additionally, the April 21, 2008 opinion is attached to this correspondence as *Exhibit 30*, and the August 23, 2002 opinion is attached to this correspondence as *Exhibit 31*. The documentation attached to this correspondence as *Exhibits 32-38*, are additional analyses of injury data performed by IPCS.

REQUEST NO. 4:

Submit copies of any and all correspondence between Respondent and Industrial Physical Capability Services in connection with use of the IPCS test and/or its results, including but not limited to instructions for interpreting test results, information regarding usage of the test, and contracts.

RESPONSE TO REQUEST NO. 4:

The IPCS Scheduling Manual provides sample reports to assist in interpreting the evaluation results. *See* Respondent's Position Statement Exhibit 14.

REQUEST NO. 5:

Submit an electronic database identifying all individuals (whether employees, prospective new hires, or actual new hires) given the IPCS test from January 1, 2006 to present date at Respondent's direction. For each, provide the following information:

a. employee identification number;

b. first name;

c. last name;

d. date of hire;

e. date of birth;

f. gender;

g. reason for administration of the test;

h. date(s) of test;

i. indicate if the individual passed or failed;

j. position title;

k. last known home address and telephone numbers.

RESPONSE TO REQUEST NO. 5:

See the documentation attached to this correspondence as *Exhibit 39* (provided in hard copy and electronic format). Please note that the reason for the administration of the test is identified as either: (1) New Hire, (2) Readiness, or (3) Complimentary. The "New Hire" designation includes all candidates who sought and were conditionally offered a particular position identified as physically demanding such that a FCE was necessary. The "Readiness" designation includes employees who returned to work after an absence of 30 or more days, as well as individuals who were seeking a promotion to a job that was more physically demanding than their current job. Employees who sought such a promotion but did not, at that time, qualify to perform the essential functions of the more physically demanding position, were eligible to return to their original positions. The "Complimentary" designation refers to administrative or management employees who voluntarily took the FCE to familiarize themselves with the process. Those individuals were not required to meet any physical capability requirements.

REQUEST NO. 6:

Provide a listing of all position titles and all position descriptions in use at Respondent's facilities from January 1, 2006 to the present.

RESPONSE TO REQUEST NO. 6:

A chart of Respondent's position titles for employees who are required to take the IPCS evaluation and also hourly administrative/office staff positions is attached to this correspondence as *Exhibit 40*. The Job Task Analysis Reports for those positions identified as physically demanding are attached to this correspondence as *Exhibits 41-54*.

REQUEST NO. 7:

Submit a complete copy of Charging Party's personnel file, including but not limited to any correspondence regarding the IPCS test administered to Charging Party.

RESPONSE TO REQUEST NO. 7:

Charging Party's personnel file is attached to this correspondence as *Exhibit 55*, and her confidential file is attached to this correspondence as *Exhibit 56*. Charging Party was provided the IPCS Scheduling Manual, attached to Respondent's Position Statement, *Exhibit 14*. Additionally, employees who do not successfully complete the FCE on their first attempt are encouraged to work to enhance their physical capabilities, and are provided with resources to assist them. *See, e.g.*, Training Information and Strengthening Chapter in Dr. Tom Gilliam's Materials, attached to this correspondence as *Exhibit 57*.

To assist employees and enable them to prepare for the FCE, McLane Sunwest provides those employees who anticipate being on leave that may exceed 30 consecutive calendar days with the IPCS Advisement Letter, attached to this correspondence as *Exhibit 58*. Employees whose absence exceeds 30 consecutive calendar days are provided the IPCS Return-to-Work Letter, attached to this correspondence as *Exhibit 59*. Applicants with a conditional job offer for a particular position are given the Pre-employment Functional Capabilities Evaluation Notice and the Physical Capability Strength Test: One Component of the New Hire Selection Process summary, attached to this correspondence as *Exhibits 60-61*.

Additionally, all employees, including new hire employees, are given the IPCS Physical Capability Strength Test summary document that provides a brief description and understanding of the IPCS evaluation, the Guidelines for Physical Capability Assessment, and the IPCS Applicant Information Page, attached to this correspondence as *Exhibits 62-64*.

REQUEST NO. 8:

Submit copies of any and all adverse impact analyses completed in conjunction with Respondent's employees or new hires who took the IPCS test from January 1, 2006 to present date.

RESPONSE TO REQUEST NO. 8:

Respondent does not have any documents responsive to this request.

REQUEST NO. 9:

Submit copies of any and all internal correspondence relating to, concerning, or memorializing Respondent's decision to implement, use, or discontinue the IPCS test.

RESPONSE TO REQUEST NO. 9:

Respondent has been unable to locate any documents responsive to this request.

REQUEST NO. 10:

Identify the facility where Charging Party took her IPCS test, including the provider name and location, and identify the person who administered the test to Charging Party.

RESPONSE TO REQUEST NO. 10:

Charging Party took the IPCS functional ability evaluation at Valley Rehab in Goodyear. McLane Sunwest does not participate in the actual evaluation. McLane Sunwest's primary contact at Valley Rehab in Goodyear is Mr. Ken Lundeen.

REQUEST NO. 11:

Identify any and all individuals acting as liaison between Respondent and Industrial Physical Capability Services in connection with the IPCS test.

RESPONSE TO REQUEST NO. 11:

The test administrators at Valley Rehab, insofar as they administer the test, act as liaisons between Respondent and Industrial Physical Capability Services.

REQUEST NO. 12:

Submit an electronic database identifying all individuals employed by the Respondent from January 1, 2006 to present date. For each, provide the following information:

a. employee identification number;

b. first name;

c. last name;

d. date of hire;

e. date of birth;

f. gender;

g. position title.

RESPONSE TO REQUEST NO. 12:

See the documentation attached to this correspondence as Exhibit 39, which includes the employees and applicants with a conditional job offer for a particular position that are required to participate in an IPCS functional capacity evaluation.

Very truly yours,

Snell & Wilmer

/s/ Ashley Kasarjian
Joshua Woodard
Ashley Kasarjian

[Doc. 2-1]

EXHIBIT 9

[SEAL]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
(866) 866 [sic]-8075
TTY (602) 640-5072
FAX (602) 640-5071

Bobby Carlson, President
McLane Sunwest
14149 W. McDowell Road
Goodyear, AZ 85323

RE: **EEOC v. McLane Company**
Charge Number: 540-2010-01761

Dear Mr. Carlson:

This is to inform you that the Equal Employment Opportunity Commission (EEOC) is reviewing the compliance status of your organization under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626 et. seq. (ADEA). This is a nationwide investigation of all facilities owned and/or operated by McLane Company. Please submit the information requested in the enclosed Request for Information (for Charge Numbers 540-2010-01761 EEOC v. McLane Company and 540-2008-01093 Ochoa v. McLane Sunwest) **on or before September 6, 2010** in both *hardcopy and electronic format.* The ADEA provides the EEOC with broad enforcement and investigative powers. This authority is restated at 29 C.F.R. § 1626.4 and 1626.15(a).

Section 1626.4 provides, in relevant part:

> "The Commission may, on its own initiative, conduct investigations of employers, employment agencies and labor organizations, in accordance with the powers vested in it pursuant to Sections 6 and 7 of the Act."

Section 1626.15(a) provides as follows:

> "As provided in Sections 9, 11, 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209, 211, 216 and 217) (FLSA) and Sections 6 and 7 of this Act [ADEA], the Commission and its authorized representatives may (1) investigate and gather data; (2) enter and inspect establishments and records and make transcripts thereof; (3) interview employees; (4) impose on persons subject to the Act appropriate record keeping and reporting requirements; (5) advise employers, employment agencies and labor organizations with regard to their obligations under the Act and any changes necessary in their policies, practices and procedures to assure compliance with the Act; (6) subpoena witnesses and require the production of documents and other evidence; (7) supervise the payments of amounts owing pursuant to section 16(c) of the FLSA, and (8) institute action under section 16(c) or section 17 of the FLSA, or both, to obtain appropriate relief."

Your anticipated cooperation is appreciated. All questions or inquiries should be directed to Barbara Rusden at (602) 640-5054.

Sincerely,

Date: AUG 06 2010

/s/ Rayford O. Irvin
Rayford O. Irvin
Acting District Director
Phoenix District Office

Enclosure

cc: Joshua Woodward, Snell & Wilmer
Ashley Kasarjian, Snell & Wilmer

REQUEST FOR INFORMATION
A D E A Directed v. McLane Company, Inc.
Charge Number 540-2010-01761
and
Ochoa v. McLane Sunwest
Charge No. 540-2008-01093

Relevant time period: January 1, 2006 to present date

Respondent: McLane Company, Inc. (all facilities/ locations nationwide including corporate)

1. Submit the name, title, address and telephone number of the person to whom further inquiries regarding these charges should be directed.

2. Provide the correct legal name and business address of the Respondent named in each charge and describe the nature of Respondent's business. Include any and all trade names, d/b/a's, or former names. Also include documentation either already in existence or prepared by Respondent in response to this request that describes or provides the following information:

    a. the type of corporate or business entity

    b. approximate number of employees during calendar years 2007 and 2008

    c. location of corporate headquarters

d. current status of the corporation, i.e. active, inactive, or another status

e. the name of Respondent's corporate officers, directors, and owners

f. the statutory agent for Respondent in Arizona

g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

i. Provide the legal name and business address of all superior and subordinate business entities identified.

ii. Provide the statutory agent for all superior and subordinate business entities identified.

3. Does the Respondent have a policy of liability insurance that will provide coverage for the claims asserted in these charges? If so, please provide a copy of the policy.

4. Submit a copy of any employee handbook in effect during the relevant time period and

a. explain in detail how this information is disseminated to employees, and

b. provide the date when any employee handbook went into effect, and the dates of any revisions.

5. List each test used by Respondent during the relevant time period, including but not limited to Industrial Physical Capability Strength test (IPCS)

and Isokinetic Physical Capability Test (IPCT), and list any variations of each test in use.

a. For each test variation listed, identify all jobs or job classifications for which it has been used.

6. For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #5 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:

a. describe how the test was developed and how it is used by Respondent,

b provide the name of each test's or variation's author or creator; the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

c. describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the process. Include all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include any and all documents reviewed by any key decision makers in addition to paragraph 7 below,

d. specify the effective dates of use of each test or variation at each of Respondent's locations,

e. provide any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for

individual(s) who administer the test and individual(s) who take the test,

f. provide a description of how each test or variation is administered and scored. Include a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

g. provide a list of all jobs and job classifications for which any test or variation is used;

h. for each job or job classification for which a test or variation is used, identify the specific test or variation (listed in response to paragraph 5) used for that job or job classification,

i. for each job or job classification for which a test or variation is used, identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide details on the process by which any scoring/classification system was established, and provide details about the process by which Respondent determined the minimum score considered "passing.".

j. for each job or job classification for which a test or variation is used, provide job descriptions.

k. provide copies of any and all adverse impact studies performed for each test or variation.

7. Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #5 and #6 above, to include any notes or other documents concerning development and implementation of the test by Respondent.

8. For all positions at Respondent's facilities/ locations nationwide for which any test or variation identified in #5 and #6 above is used, provide the Job Task Analysis for each position. Include:

   a. a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and

   b. any documents and/or videos containing job analysis information for all positions wherein testing is applied to employees and/or new hires.

9. For the relevant time period, provide documents or a listing* of information identifying all persons who took any test or variation identified in #5 and #6 in connection with employment at any of Respondent's locations or facilities nationwide. Provide a separate list for each facility/location nationwide and annotate the list by:

---

* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of birth

g. date of application

h. date of hire (or promotion), and job classification at hire (or promotion)

i. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

j. position held at the time test was administered (for individuals employed at the time or returning to work)

k. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

10. Provide a list of all Respondent's facilities and locations in existence during the relevant time period.

11. For all Respondent facilities/locations nationwide during the relevant time period and with respect to any test or variation identified in #5 and #6 above, provide documents or a list* of information identifying all persons by name, last known home address and telephone number, and social security number, who were:

    a. terminated because of an inability to pass any test or variation,

    b. reassigned and/or transferred because of an inability to pass any test or variation,

    c. not hired because of an inability to pass any test or variation,

    d. not promoted because of an inability to pass any test or variation,

12. For each person identified in 11(a) through 11(d), provide:

    a. date of termination, reassignment, transfer, not hired or not promoted,

    b.. name and title of the individual who made the decision to terminate, reassign, not hire and/or not promote the person based on test results.

13. For each test or variation identified in #5 or #6, provide any and all evidence which shows any change, whether a reduction or increase, in workplace injuries.

14. During the relevant time period, if Respondent received any formal or informal complaints by any employee other than Charging Party concerning the test(s), or any claims of discrimination based on sex, disability and/or age, submit the following:

    a. name and job title of each person who complained,

    b. name and job title of each person receiving each complaint,

    c. date of each complaint,

    d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

    e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken.

15. Provide a list* of all individuals who applied for a position, for which the test identified in #5 and #6 above was in use, at any location or facility of Respondent during the relevant time period. Annotate the list by:

    a. name

    b. social security number

    c. last known home address and telephone number

    d. sex

    e. medical condition(s)

f. date of birth

g. date of application

h. whether the applicant was hired, and date and reason for hire or non-hire

i. location at which they applied and

j. position for which they applied.

16. Provide a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #5 and #6 above was in use, at any and [sic] location or facility of Respondent during the relevant time period. Annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of birth

g. date promotion sought

h. whether the individual seeking promotion was selected, and, if so, date and reason for selection or non-selection

i. location at which they sought promotion and

j. position for which they sought promotion.

17. Provide a list* of all individuals who were employed by Respondent at any location or facility nationwide during the relevant time period. Provide a separate list for each facility/location nationwide and annotate the list by:

    a. name

    b. social security number

    c. last known home address and telephone number

    d. sex

    e. medical condition(s)

    f. date of birth

    g. date of hire

    h. all position titles held

    i. dates when each position title was held

    j. termination date and reason, if applicable.

18. Provide a complete copy of Charging Party's personnel file, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by her, complaints made about her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination and Charging Party's medical file, including but not limited to test scores or results,

documentation from treating physicians, documentation from non-treating physicians, and medical or physical evaluations by Respondent's personnel.

19. Provide complete copies of the personnel files, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by him or her, complaints made about him or her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination for Bobby Carlson (President), Theresa Hatch (Human Resources Manager) and Janann Williams (Vice President, People).

* * *

[Doc. 2-1]

EXHIBIT 12

EEOC Form 136
(10/94)

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

SUBPOENA

TO: Grady Rosier, President/CEO NO: PHX-11-32
McLane Company
4747 McLane Parkway
Temple, TX 76504

IN THE MATTER OF: Ochoa v. McLane Sunwest

Charge No. 540-2008-01093

Having failed to comply with previous request(s) made by or on behalf of the undersigned Commission official, YOU ARE HEREBY REQUIRED AND DIRECTED TO:

☐ Testify before: ☐ Produce and bring * or
☒ Mail * the documents described below to:

☐ Produce access to the evidence described below for the purpose of examination or copying to:

Investigator Barbara Rusden of the Equal Employment Opportunity Commission

at 3300 N. Central Ave., Ste. 690, Phoenix, AZ 85012 on March 11, 2011 at 4:00 p.m. o'clock

The evidence required is

See Attachments A and B which are incorporated herein by reference.

cc: Bobby Carlson, McLane Sunwest
Ashley Kasarjian, Snell & Wilmer
Joshua Woodard, Snell & Wilmer

This subpoena is issued pursuant ☒ (Title VII) 42 U.S.C. 2000e-9 ☐ (ADEA) 29 U.S.C. 626(a) ☐ (EPA) 29 U.S.C. 209 ☒ (ADA) 42 U.S.C. 12117(a)

ISSUING OFFICIAL
(Typed name, title and address) ON BEHALF OF THE COMMISSION

[SEAL]

Rayford O. Irvin
District Director
330 N. Central Ave.,
Ste. 690
Phoenix, AZ 85012 /s/ Rayford O. Irvin FEB 15 2011
Date

*NOTICE TO PERSON SUBPOENAED—The Commission will not pay witness fees or travel expenses for the delivery of required documents to a Commission office unless the box "Testify before" is also checked on the subpoena.

[Subpoena Proof Of Service Omitted]

ATTACHMENT A TO PHX-11-32

If Respondent withholds any evidence or document in responding to this subpoena, Respondent is instructed to provide a detailed description of the evidence or document withheld and the specific basis upon which it is being withheld.

"Evidence" shall mean any information whether presently compiled in documentary form or capable of being compiled and which exists in any form, including but not limited to that information which may exist in the minds of supervisors or workers. See Equal Employment Opportunity Commission v. Maryland Cup Corp., 785 F.2d 471 (4th Cir. 1986)

"Documents" or "Documentary Form" shall mean and include all written, printed, typed, graphic material,

computer files or other tangible mediums of reproduction or communication, of every kind and description, however produced or reproduced, by whomever prepared, to whomever addressed, which are in possession, custody, or control of the person or entity to which this Subpoena is directed or to which such person or entity has, has had, or can obtain access. Further, the term "documents" includes any copies or documents which are not identical duplicates of the originals, including, but not limited to, all drafts of whatever date, copies with typed or handwritten notations, and copies of documents the originals of which are not in the possession, custody, or control of the person or entity to which the Subpoena is directed.

Date FEB 15 2011 /s/ Rayford O. Irvin

Rayford O. Irvin, District Director
Equal Employment
Opportunity Commission
330 N. Central Avenue, Suite 690
Phoenix, AZ 85012

ATTACHMENT B TO PHX-11-32

Respondent: McLane Company, Inc. (all facilities/ locations nationwide including corporate)

1. Documents which reflect the nature of Respondent's business, any and all trade names d/b/a's or former names. Also include documentation either already in existence or prepared by Respondent in

response to this request that describes or provides the following information:

a. the type of corporate or business entity

b. approximate number of employees during calendar years 2007 and 2008

c. location of corporate headquarters

d. current status of the corporation, i.e. active, inactive, or another status

e. the name of Respondent's corporate officers, directors, and owners

f. the statutory agent for Respondent in Arizona

g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

i. Provide the legal name and business address of all superior and subordinate business entities identified.

ii. Provide the statutory agent for all superior and subordinate business entities identified.

2. Documents which reflect liability insurance that will provide coverage for this charge.

3. Submit copies of any and all employee handbooks in effect from January 1, 2006 to the present and

a. provide documents which reflect in detail how this information is disseminated to employees, and

b. provide documents which reflect the date when any employee handbook went into effect, and the dates of any revisions.

4. Documents which reflect or a list identifying each test used by Respondent from January 1, 2006 to the present, including but not limited to Industrial Physical Capability Strength test (IPCS) and Isokinetic Physical Capability Test (IPCT), and provide documents which reflect any variations of each test in use.

a. for each test variation, provide documents which reflect or a list which identifies all jobs or job classifications for which it has been used.

b. list all alternative names used to describe or refer to each test and variation.

5. For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #4 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:

a. provide documents which reflect how the test was developed and how it is used by Respondent,

b. provide documents which reflect the name of each test's or variation's author or creator; the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

c. provide documents which describe the process that led to Respondent's implementation of each test or variation, including the names and titles of

all key decision makers involved in the process. Include copies of all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include copies of any and all documents reviewed by any key decision makers in addition to paragraph 6 below,

d. provide documents which reflect the effective dates of use of each test or variation at each of Respondent's locations,

e. provide documents which reflect any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for individual(s) who administer the test and individual(s) who take the test,

f. provide documents which reflect a description of how each test or variation is administered and scored. Include documents which reflect a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

g. provide documents which reflect or a list of all jobs and job classifications for which any test or variation is used;

h. for each job or job classification for which a test or variation is used, provide documents which identify the specific test or variation (listed in response to paragraph 5) used for that job or job classification,

i. for each job or job classification for which a test or variation is used, provide documents which identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide documents which reflect the details on the process by which any scoring/classification system was established, and provide documents which reflect the details about the process by which Respondent determined the minimum score considered "passing."

j. for each job or job classification for which a test or variation is used, provide copies of the job descriptions.

k. provide copies of any and all adverse impact studies performed for each test or variation.

6. Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #4 and #5 above, to include any notes or other documents concerning development and implementation of the test by Respondent.

7. For all positions at Respondent's facilities/ locations nationwide for which any test or variation identified in #4 and #5 above is used, provide a copy of the Job Task Analysis for each position. Include:

a. documents which reflect or a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and

b. any documents containing job analysis information for all positions wherein testing is applied to employees and/or new hires.

8. For January 1, 2006 to the present date, provide documents or a listing* of information identifying all persons who took any test or variation identified in #4 and #5 in connection with employment at any of Respondent's locations or facilities nationwide. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

---

* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

g. date of hire (or promotion), and job classification at hire (or promotion)

h. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

i. position held at the time test was administered (for individuals employed at the time or returning to work)

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

9 Provide documents which reflect or a list of all Respondent's facilities and locations in existence from January 1, 2006 to the present.

10. For all Respondent facilities/locations nationwide from January 1, 2006 to the present and with respect to any test or variation identified in #4 and #5 above, provide documents or a list* of information identifying all persons by name, last known home address and telephone number, and social security number, who were:

a. terminated because of an inability to pass any test or variation,

b. reassigned and/or transferred because of an inability to pass any test or variation,

c. not hired because of an inability to pass any test or variation,

d. not promoted because of an inability to pass any test or variation,

11. For each person identified in 11(a) through 11(d), provide documents which reflect:

a. date of termination, reassignment, transfer, not hired or not promoted,

b.. name and title of the individual who made the decision to terminate, reassign, transfer, not hire and/or not promote the person based on test results.

12. For each test or variation identified in #4 or #5, provide any and all documents evidencing any change, whether a reduction or increase, in workplace injuries.

13. From January 1, 2006 to the present, if Respondent received any formal or informal complaints by any employee other than Charging Party concerning the test(s), or any claims of discrimination based on sex and/or disability, submit documents evidencing the following:

a. name and job title of each person who complained,

b. name and job title of each person receiving each complaint,

c. date of each complaint,

d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken.

14. Provide documents or a list* of all individuals who applied for a position, for which the test identified in #4 and #5 above was in use, at any location or facility of Respondent during the relevant time period. Include:

a. name

b. social security number

c. last known home address and telephone number

d sex

e. medical condition(s)

f. date of application

g. whether the applicant was hired, and date and reason for hire or non-hire

---

* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

h. location at which they applied and

i. position for which they applied.

15. Provide documents or a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #4 and #5 above was in use, at any and [sic] location or facility of Respondent from January 1, 2006 to the present. Include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date promotion sought

g. whether the individual seeking promotion was selected, and, if so, date and reason for selection or non-selection

h. location at which they sought promotion and

i. position for which they sought promotion.

16. Provide documents or a list* of all individuals who were employed by Respondent at any location or

---

* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with

facility nationwide from January 1, 2006 to the present. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of hire

g. all position titles held

h. dates when each position title was held

i. termination date and reason, if applicable.

17. Provide complete copies of the personnel files, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by him or her, complaints made about him or her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination for Bobby Carlson (President), Theresa Hatch (Human Resources Manager) and Janann Williams (Vice President, People)

---

subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

18. List any and all alternatives to the ICPS [sic] or IPCT test that Respondent considered implementing in lieu of the ICPS [sic] or IPCT test. Include:

a. copies of all documents Respondent reviewed in considering any such alternatives.

b. copies of all documents relating to any findings, analyses, or determinations made by Respondent regarding any such alternatives.

[Certified Mail Receipt Omitted]

[Doc 2-1]

EXHIBIT 13

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
400 East Van Buren Street
Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000
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PHOENIX
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Ashley T. Kasarjian
602-382-6544
akasarjian@swlaw.com

February 22, 2011

VIA FAX: (602) 640-5071
AND HAND DELIVERY

Rayford O. Irvin
Equal Employment Opportunity Commission
District Director (Issuing Official)
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012

Re: **Petition to Revoke Subpoena**
No. PHX-11-32
Damiana Ochoa v. McLane Sunwest
Charge No.: 548-2008-01093

Dear Mr. Irvin:

Pursuant to 29 C.F.R. § 1601.16, Respondents McLane Company, Inc. ("McLane") and McLane/Suneast, Inc. ("McLane Sunwest")[1] hereby petition the EEOC to revoke Subpoena No. PHX-11-32, dated February 15, 2011 (the "Subpoena"), requesting documents and information relating to the matter of *Ochoa v. McLane Sunwest* (Charge No. 540-2008-01093). *See* EEOC Subpoena, Attach. A. Respondents submit this petition to request that the Subpoena be revoked in its entirety, as Respondents have already complied with all reasonable requests. In the alternative, Respondents request that the EEOC withdraw and/or modify the Subpoena,

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[1] The EEOC issued the current Subpoena to McLane Company, Inc. However, the underlying Charge of Discrimination filed by Ms. Damiana Ochoa was filed solely against her employer, McLane Sunwest. Accordingly, both McLane Company, Inc. and McLane Sunwest petition the EEOC to revoke the Subpoena.

and engage in discussions as to the scope of information sought.

As noted in earlier correspondence and discussed more fully herein, Respondents have concerns with the breadth and scope of the Subpoena and information sought. Notwithstanding such concerns, Respondents have consistently expressed a willingness to cooperate with the EEOC and have made efforts to confer with EEOC officials at many levels. Respondents remain committed to engaging in such discussions and information sharing; however, the EEOC's issuance of the Subpoena necessitates this Petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Respondents McLane Company, Inc. and McLane Sunwest

McLane Company, Inc. is a supply chain services company, providing grocery supply chain solutions for convenience stores, mass merchants, drug stores, and military locations throughout the United States. In addition to having several discrete operating locations, McLane also has a number of completely separate subsidiary companies.

McLane/Suneast, Inc., d/b/a "McLane Sunwest" is a subsidiary of McLane that operates as a grocery distribution center in Goodyear, Arizona. Since opening in 1985, it has provided services to its customers located in Arizona, Nevada, New Mexico and Texas. McLane

Sunwest has been, and remains, committed to developing dedicated, well-trained teams that are focused on excellence. As an equal opportunity employer, McLane Sunwest prohibits unlawful discrimination in every aspect of the employment relationship. Further, McLane Sunwest is committed to protecting the safety and health of all its employees.

B. Ms. Ochoa's Charge of Discrimination

Ms. Damiana Ochoa ("Ms. Ochoa") filed a Charge of Discrimination against McLane Sunwest on January 7, 2008 alleging that she was discriminated against because of her sex (female) and alleged disability (pregnancy).[2] In her charge of sex and disability discrimination, Ms. Ochoa alleged as follows:

> On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (physical capability strength test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007, and December 28, 2007, I retested and did not pass. I have worked for the above-named employer for over eight years as a cigarette selector.

---

[2] EEOC Investigator, Barbara Rusden, confirmed during the interview of Ms. Theresa Hatch that the EEOC was not alleging that Ms. Ochoa's pregnancy was a disability protected by the ADA.

> I believe I have been discriminated against because of my sex, female, (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> The physical capability strength test is given to all employees returning to work from medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended.

McLane Sunwest denies Ms. Ochoa's allegations in their entirety and provided the EEOC with evidence showing that she had not been discriminated against in any way. As explained in its position statement dated April 25, 2008, McLane Sunwest hired Ms. Ochoa as a Selector II/Mezzanine Selector. In this position, Ms. Ochoa was required to perform various physical tasks, such as: (1) pulling stacks of 25 empty totes to a staging area (which required up to 145 lbs. of force); (2) lifting totes off stacks and placing them on a roller belt; (3) pushing/pulling totes up or down the roller belt; (4) stocking shelves; and (5) lifting/lowering/carrying/sliding 40 lb. wooden pallets. All physically demanding positions at McLane Sunwest are assigned either the "Medium," "Medium-Heavy" or "Heavy" category based upon the physical demands of the job requirements, as assessed by an independent ergonomic expert. Ms. Ochoa's position required "Medium-Heavy" lifting and physical exertion.

McLane and its subsidiaries take the safety of their employees seriously. Specifically, with regard to

McLane Sunwest, in order to ensure that employees are capable of safely performing these physically demanding jobs, all newly hired employees, employees returning from an absence of thirty days or more, as well as individuals seeking a job that is more physically demanding than their current job, are required to take a physical capability exam known as the Industrial Physical Capability Strength Test (referred to as "PCE" or "IPCS test"). If an employee cannot meet the minimum strength requirement for the particular position, the employee may be given an opportunity to retest. During this time, the employee is encouraged to work to enhance their overall physical capability.

i. General Information Regarding IPCS Testing

Industrial Physical Capability Services, Inc. ("IPCS") oversees the testing in order to ensure objectivity, validity, and reliability. Over the past thirty years, IPCS has provided its standardized capability assessments to numerous industrial clients in the trucking, distribution, airline, manufacturing and utility industries. Numerous comparative studies have evaluated the effectiveness of IPCS testing on the reduction in the frequency and severity of injuries. For example, in a 16-month analysis of new employees who were evaluated by IPCS testing, there was a 70.5% reduction in the incident rate of injury. In another study, 14 food distribution locations took part in a 35-month study that concluded that there was a dramatic impact

on the reduction of the frequency and severity of injuries.

In order to match the physical capabilities of the worker to the physical demands of a particular job, a Job Task and Physical Activities Analysis is performed by an independent company that observes and analyzes the performance of the job duties. This analysis determines the target physical capability score required for each particular job. McLane Sunwest employees go to an approved clinic, with trained IPCS providers, to take the PCE. The PCE is performed on an isokinetic machine that focuses on the major muscle groups of the shoulders and legs, as strength in these two areas is necessary when performing the essential functions of these physically demanding jobs. The machine allows a dynamic evaluation of specific movement patterns and accommodates an individual's weaknesses and strengths by providing resistance equal to the force applied against the machine.

IPCS testing is critical at McLane Sunwest given the physically demanding nature of certain jobs. For example, a Selector II may pick approximately 2,300 pieces of product from racks to place in totes, filling 1,000 totes per shift.

ii. Ms. Ochoa's IPCS Testing

Ms. Ochoa requested and was granted FMLA leave for the birth of a child. Upon concluding her FMLA leave, she successfully completed the required "Return to Work" test and was promptly reinstated. In

June 2007, Ms. Ochoa again requested and was granted FMLA leave for the birth of another child. Following the expiration of her second leave, Ms. Ochoa did not meet the minimum physical strength capability to safely perform the essential functions of her medium-heavy position—despite being given three separate chances at the physical capability examination. As a result of her third failure, IPCS concluded that she was unable to meet the minimum qualifications to perform the essential functions of her job. Because no alternative position existed at or below her strength capability, her employment was terminated on January 9, 2008.

iii. McLane Sunwest's Response to Ms. Ochoa's Charge

McLane Sunwest denies Ms. Ochoa's allegations in their entirety and has provided the EEOC with evidence showing that she had not been discriminated against in any way. In response to Ms. Ochoa's Charge, McLane Sunwest submitted a position statement with 24 supporting exhibits on April 25, 2008. *See* Summary of Exhibits Produced, Attach. B. In addition, in response to the EEOC's first Request for Information ("First RFI"), McLane Sunwest submitted a supplemental response and supporting exhibits 25-64 on November 13, 2009. McLane Sunwest also permitted the EEOC to conduct an on-site visit of the McLane Sunwest facility, and agreed to the interview of Theresa Hatch, Human Resources Manager, on March 9, 2010,

and Janann Williams, Vice President, People, on August 5, 2010. As discussed in Section C below, McLane Sunwest also provided the EEOC with additional information and produced exhibits 65-75 (including various subparts) on January 14, 2011, in response to the EEOC request for information ("Second RFI").

Among the documents disclosed were policies and procedures related to the IPCS test, documents related to Ms. Ochoa's taking of the test and her IPCS test results, a breakdown of all IPCS test results from McLane Sunwest and related data regarding the employees taking the test, the job task analysis for Ms. Ochoa's position and for other positions at McLane Sunwest and within grocery operations, the documentation employees receive regarding the IPCS testing, physical demands and strength definitions, a validation study and injury analyses prepared by IPCS, opinion letters regarding the validity of the IPCS test, Ms. Ochoa's entire personnel file, and documents explaining the IPCS test.

C. The EEOC's Expansion of Ms. Ochoa's Charge

Notwithstanding the voluminous documents and data produced relating to Ms. Ochoa's claim, the EEOC has continued to request more information and documents. First, to avoid the statutory limit to its ability to investigate Ms. Ochoa's Charge under Title VII, the EEOC simply added an additional charge number to its request for information relating to Ms. Ochoa's

charge and now claims to be investigating nationwide ADEA compliance. In doing so, the EEOC argues that the nationwide scope of its subpoena relating to Ms. Ochoa's Charge is justified. Thus, without an actual Charge of Discrimination, Charging Party, or Commissioner's Charge, the Phoenix office of the EEOC expanded the Ochoa sex and disability investigation into an ADEA investigation of McLane Company, encompassing all related entities nationwide. Notably, Ms. Ochoa was not 40 years old or older at the time of her employment with Sunwest, and would not have been afforded the protections of the Age Discrimination in Employment Act, as amended by the Older Workers Benefits Protection Act.

Moreover, although asked, Investigator Rusden stated that the EEOC was not willing to explain the basis for this EEOC-initiated investigation or why it is warranted or justified. While the request for age-related data was removed from the request regarding Ms. Ochoa's Charge—it remains on the "separate" ADEA Charge—and the EEOC has continued to assert that it is expanding the scope of its investigation of Ms. Ochoa's Charge nationwide, despite the fact that the Company is comprised of operationally-distinct divisions.

In a letter dated September 3, 2010, McLane made clear that it was willing to cooperate with any reasonable investigation conducted by the EEOC, but pointed out that the EEOC never provided McLane a copy of the purported new charge or any other notice of

the purported ADEA allegations warranting an expanded "nationwide investigation" of ADEA compliance. McLane explained that it could not begin to analyze the EEOC's extensive request for information without such notice. McLane also raised concerns with the intermingling of this purported new ADEA charge and Ms. Ochoa's charge and the suspicious timing of the request, following objections to the investigation exceeding the scope authorized by Title VII. McLane asked the EEOC for some explanation of the basis for investigating ADEA compliance, including requesting a copy of the Charge referenced. McLane also expressed its willingness to cooperate and requested clarification as to the EEOC's significant request by correspondence dated December 7, 2010, telephonically during a conversation with EEOC Investigator Barbara Rusden on January 12, 2011, and again, on January 19, 2011.

At the same time the EEOC initiated the ADEA investigation, the agency sent identical requests for information requesting nationwide information from all facilities and subsidiaries of McLane relating to claims of gender and disability discrimination. Ms. Rusden subsequently apologized for intermingling the two requests, and then, sent two nearly identical requests to Respondents. Accordingly, McLane Sunwest responded to the EEOC's amended Second RFI and provided additional documentation relating to McLane Sunwest and the grocery division. *See* Attach. B. McLane Sunwest further objected to any further expansion of nationwide data, as any requests for information relating

to the food division would not be relevant to Ms. Ochoa's employment or allegations and could not have arisen from Ms. Ochoa's Charge.

Of significance, the employees in the food division are not similarly situated to the employees in the grocery division. In addition to the fact that the separate McLane facilities are independent centers, the food service division and grocery division are entirely distinct companies operationally. As Ms. Janann Williams explained during her August 5, 2010 interview, the decision to use the IPCS test in the grocery division was made independently of the decision to use the IPCS test in the food service division. Ms. Williams further noted that each division had its own Job Task Analyses prepared. Accordingly, the prior actions of the food service division are not the subject of or related to Ms. Ochoa's Charge. Ms. Ochoa was never employed in a food service distribution center, and none of her allegations relate to the food service distribution centers. The EEOC's request, seeking information and documentation from distinct companies, distinct operations, and distinct divisions of McLane Company, Inc. could not fairly or accurately be argued to have arisen from the EEOC's investigation of Ms. Ochoa's Charge.

Throughout its investigation, the EEOC has sought information beyond what is relevant to Ms. Ochoa's allegations. Although Ms. Ochoa alleged only gender and disability discrimination relating to her attempt to return to work at McLane Sunwest, the

EEOC sought broad nationwide, company-wide information regarding all facilities, business divisions, and related entities far beyond Ms. Ochoa's allegations.

D. Respondents' Proposed Less Burdensome Alternative Production

McLane Sunwest has cooperated with the EEOC and its investigation of Ms. Ochoa's Charge, and is willing to continue complying with the agency's requests for information, to the extent they are reasonable and within the agency's statutory authority. Moreover, as reiterated on multiple occasions, Respondents have been and remain willing to provide information to allow the EEOC to analyze the validity of the IPCS test in order to avoid the burden and expense of production of the vast amount of information sought on a nationwide basis.

Of significance, McLane Sunwest has already produced 75 exhibits, many with subparts, in response to Ms. Ochoa's Charge and the EEOC's requests for information. Included in its production, McLane Sunwest has provided specific data regarding the IPCS testing at its location. In particular, the EEOC was provided with an excel file containing the employees' gender, test date, test reason, job class, job target, whether the employee met the minimum requirements of the position he or she was testing for, and the level he or she met.

Respondents object to the current requests for information and documents as they would be unduly

burdensome to produce, are not relevant to the EEOC's investigation of Ms. Ochoa's Charge, and accordingly, are beyond the EEOC's statutory authority. However, Respondents are more than willing to discuss additional suggestions to stage document/information production to allow for a streamlined and less burdensome collection and production in order that the EEOC may evaluate the validity of the IPCS test—which may negate the need for further expense and investigation.

II. GENERAL OBJECTIONS

As a preliminary matter, Respondents object to the expansion of the investigation outside the scope of the underlying Charge into a division of the Company which Charging Party was not even employed. An investigation into all McLane locations is overly broad, unduly burdensome, and seeks information that is not relevant to the underlying Charge of Discrimination.

Further, the EEOC issued an almost identical subpoena relating to the ADEA investigation. *See* Subpoena No. PHX-11-33, Attach. C.[3] As discussed in

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[3] The only issue for consideration as to this petition is the expansion of Ms. Ochoa's Charge, as the Subpoena issued relating to the ADEA investigation has been addressed in separate correspondence by Morgan, Lewis & Bockius LLP, on behalf of McLane Company, Inc. However, the ADEA Subpoena is offered as an attachment to this petition due to the Respondents' concerns regarding the intermingling of the investigations. Notably, "[t]he scope of the judicial inquiry in an EEOC or any other agency subpoena enforcement proceeding is quite narrow. The critical questions are: (1) whether Congress has granted the authority to

McLane's correspondence dated September 3, 2010 and January 14, 2011, Respondents are concerned with the intermingling and timing of the requests for information in Ms. Ochoa's matter and the new Commissioner's Charge regarding the Age Discrimination in Employment Act, in addition to their burdensome nature. Of significance, the expansive requests for information were nearly identical (even after their revision), and were even initially identified as if the Charges were one-and-the-same, despite Ms. Ochoa not being over 40 years old at the time of her employment.

Further, Respondents object to the Subpoena as seeking irrelevant information, exceeding the EEOC's investigative authority and constituting an abuse of process. The requests are objectionable for several reasons, including that they: (1) require Respondents to produce or create information, electronic or otherwise, in a medium or format other than that in which it is

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investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." *E.E.O.C. v. Fed. Express Corp.*, 558 F.3d 842, 848 (9th Cir. 2009). The EEOC is only entitled to inspect and copy evidence that is relevant to the charge under investigation. *Id.* at 849 (citing *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 63 (1984) (quoting 42 U.S.C. § 2000e-8(a)); *see also University of Penn. v. E.E.O.C.*, 493 U.S. 182, 194 (1990) ("[U]nless specifically provided otherwise in the statute, the EEOC may obtain 'relevant' evidence."). "[T]he EEOC's investigative authority is tied to charges filed with the Commission; unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled access only to evidence 'relevant to the charge under investigation.'" *Shell Oil*, 466 U.S. at 64.

maintained in the normal course of business, and therefore are unduly burdensome; (2) require production and indexing of extensive electronically stored information, the collection and production of which would seriously disrupt Respondents' normal business operations and cause significant monetary expense to Respondents that would outweigh the probative value of such information, and therefore are unduly burdensome; (3) seek information and/or documents that are not relevant to the Charge under investigation or any aspect of any [sic] Ms. Ochoa's employment with McLane Sunwest and/or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related thereto the allegations in the Charge; (4) seek information concerning employment policies, practices, or decisions other than those at issue in the Charge, and therefore are not reasonably calculated to lead to the discovery of admissible evidence; (5) are not properly limited in time and seek documents beyond any statute of limitations applicable to the Charge, and therefore are not reasonably calculated to lead to the discovery of admissible evidence; (6) require Respondents to provide information and/or documents about employees nationwide at independent facilities owned and/or operated by McLane; (7) require documents to be provided that are not within the possession, custody or control of Respondents; and (8) require the Respondents to provide information and/or documents, including proprietary and confidential information, concerning McLane Sunwest and/or other the [sic] divisions of

McLane and their employees, policies, practices, or decisions other than those at issue in the Charge.

Generally, Respondents object to the Subpoena as requesting information that is irrelevant and unlikely to lead to relevant information, overly broad, unduly burdensome, and issued solely to harass Respondents. The Subpoena would require manual person-by-person analysis and data compilation on thousands of employees nationwide, significantly disrupting Respondents' business operations. Although Respondents address the specific requests in the response below, Respondents respectfully request that the company-wide Subpoena be revoked in its entirety. Alternatively, Respondents request that the EEOC consider alternative approaches to the production of information that could eliminate the EEOC's concerns through less burdensome means.

III. SPECIFIC OBJECTIONS TO THE EEOC'S REQUESTS

Request 1: **Documents which reflect the nature of Respondent's business, and any and all trade names, d/b/a's or former names. Also include documentation either already in existence or prepared by Respondent in response to this request that describes or provides the following information:**

a. **the type of corporate or business entity**

b. **approximate number of employees during calendar years 2007 and 2008**

c. location of corporate headquarters

d. current status of the corporation, i.e. active, inactive, or another status

e. the name of Respondent's corporate officers, directors, and owners

f. the statutory agent for Respondent in Arizona

g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

i. Provide the legal name and business address of all superior and subordinate business entities identified.

ii. Provide the statutory agent for all superior and subordinate business entities identified.

Response: McLane Sunwest has already produced its information in response to the EEOC's previous request. As Ms. Ochoa's Charge against McLane Sunwest is the only actual charge, the information provided should be sufficient. Respondents object to this request as seeking irrelevant information, overly broad and unnecessary to any legitimate investigation conducted by the EEOC. The address for McLane Company, Inc. is P.O. Box 6115, Temple, Texas, 76503. Its statutory agent is CT Corporation.

***Request 2*: Documents which reflect liability insurance that will provide coverage for this charge.**

***Response*:** Respondents object to this request as liability insurance is irrelevant to any legitimate investigation the EEOC could be conducting. The fact that the EEOC seeks information regarding liability insurance suggests that the EEOC is posturing for litigation prior to any investigation or conciliation efforts.

***Request 3*: Submit copies of any and all employee handbooks in effect from January 1, 2006 to the present and**

a. provide documents which reflect in detail how this information is disseminated to employees, and

b. provide documents which reflect the date when any employee handbook went into effect, and the dates of any revisions.

***Response*:** In its January 14, 2011 correspondence, McLane Sunwest produced the provisions of the grocery division handbook relevant to Ms. Ochoa's Charge. As Exhibits 65(A)-(E) through 69(A)-(E), McLane Sunwest provided the following policies: (1) Equal Employment Opportunity; (2) Harassment/ Sexual Harassment/Investigating and Resolving Complaints; (3) Safety;(4) Leave of Absence; and (5) Communication and Conduct. Accordingly, Respondents object to this request as irrelevant, overly broad,

unduly burdensome and seeking solely to harass Respondents. Respondents object to this request as seeking confidential information. Seeking handbooks in their entirety company-wide constitutes a fishing expedition. Respondents further object to the temporal scope and the lack of geographic scope.

***Request 4*: Documents which reflect or a list identifying each test used by Respondent from January 1, 2006 to the present, including but not limited to Industrial Physical Capability Strength test (IPCS) and Isokinetic Physical Capability Test (IPCT), and provide documents which reflect any variations of each test in use**

a. **for each test variation, provide documents which reflect or a list which identifies all jobs or job classifications for which it has been used,**

b. **list all alternative names used to describe or refer to each test and variation.**

***Response*:** Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane Sunwest produced detailed information regarding the IPCS test in its position statement, dated April 25, 2008, the response to the First RFI, dated November 13, 2009, and its response to the Second RFI, dated January 14, 2011, as well as at the interviews of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010.

Respondents further object to this request as seeking confidential information and because certain terms used therein are vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test. Should additional information be needed, Respondents suggest a staged and less burdensome process to facilitate the EEOC's investigation.

***Request 5*: For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #4 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:**

a. **provide documents which reflect how the test was developed and how it is used by Respondent,**

b. **provide documents which reflect the name of each test's or variation's author or creator; the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,**

c. **provide documents which describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the process. Include copies of all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include copies of any and all documents reviewed by any key decision makers in addition to paragraph 6 below,**

d. **provide documents which reflect the effective dates of use of each test or variation at each of Respondent's locations,**

e. **provide documents which reflect any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for individual(s) who administer the test and individual(s) who take the test,**

f. **provide documents which reflect a description of how each test or variation is administered and scored. Include documents which reflect a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended**

leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

g. **provide documents which reflect or a list of all jobs and job classifications for which any test or variation is used;**

h. **for each job or job classification for which a test or variation is used, provide documents which identify the specific test or variation (listed in response to paragraph 5) used for that job or job classification,**

i. **for each job or job classification for which a test or variation is used, provide documents which identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide documents which reflect the details on the process by which any scoring/classification system was established, and provide documents which reflect the details about the process by which Respondent determined the minimum score considered "passing."**

j. **for each job or job classification for which a test or variation is used, provide copies of the job descriptions.**

k. provide copies of any and all adverse impact studies performed for each test or variation.

***Response*:** McLane Sunwest produced detailed information regarding the IPCS test in its position statement, dated April 25, 2008, the response to the First RFI, dated November 13, 2009, and the response to the Second RFI, dated January 14, 2011, as well as at the interviews of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010.

Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. Respondents further object to this request as seeking confidential information, and object as certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC. Further, Respondents object to this request as it is unduly burdensome and would require each company, subsidiaries and/or operating location of McLane to produce and/or create extensive information and documentation including but not limited to the use, development, origination, implementation, scoring, and administration of tests at each facility.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

Request 6. **Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #4 and #5 above, to include any notes or other documents concerning development and implementation of the test by Respondent.**

Response: McLane Sunwest produced the validation study provided by Vedder Price P.C., dated January 14, 2005, as Exhibit 15 to the position statement submitted on April 25, 2008. Additionally, McLane Sunwest produced the validation studies provided by Vedder Price P.C., dated April 21, 2008 and August 23, 2002, as Exhibits 30 and 31 to the First RFI, dated November 13, 2009.

Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. Respondents further object to this request as seeking confidential information, and object as [sic] certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC. Further, Respondents object to this request as it is unduly burdensome and would require each company, subsidiaries and/or operating location of McLane to produce and/or create extensive information and documentation including but not limited to the use, development, origination, implementation, scoring, and administration of tests at each facility.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

***Request* 7. For all positions at Respondent's facilities/locations nationwide for which any test or variation identified in #4 and #5 above is used, provide a copy of the Job Task Analysis for each position. Include**

a. **documents which reflect or a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and**

b. **any documents containing job analysis information for all positions wherein testing is applied to employees and/or new hires.**

***Response*:** McLane Sunwest has already produced all Job Task Analyses for McLane Sunwest, as well as additional Job Task Analyses relating to grocery operations. *See* Exhibits 7, 41-54, 70-75.

Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

Request 8. **For January 1, 2006 to the present date, provide documents or a listing* of information identifying all persons who took any test or variation identified in #4 and #5 in connection with employment at any of Respondent's locations or facilities nationwide. The documents or list should be separated for each facility/location nationwide and include:**

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. medical condition

f. date of application

g. date of hire (or promotion), and job classification at hire (or promotion)

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the, field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

h. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

i. position held at the time test was administered (for individuals employed at the time or returning to work)

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

***Response*:** McLane Sunwest has already produced information relating to the IPCS testing at its facility. *See* Ex. 39. Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's reference to the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process

by the EEOC. This nationwide data is unnecessary for validating the IPCS test.

Respondents further object to this request as it would require Respondents to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Respondents' normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees and is not actively tracked and/or maintained by Respondents. It would be unduly burdensome for Respondents to produce the requested information as it would require Respondents to categorize, classify and identify information regarding its employees on a person-by-person basis.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

Request 9. **Provide documents which reflect or a list of all Respondent's facilities and locations in existence from January 1, 2006 to the present.**

Response: McLane Sunwest provided the EEOC with the list of all of McLane's grocery facilities in its correspondence dated January 14, 2011. To the extent this request seeks information regarding any other locations, Respondents object to this request as irrelevant, overly broad, and seeking solely to harass Respondents. Respondents object to this request and certain terms used therein as vague and ambiguous. McLane has already indicated that it is willing to confer with the EEOC and provide documentation as to the location of its operations.

Request 10. **For all Respondent facilities/ locations nationwide from January 1, 2006 to the present and with respect to any test or variation identified in #4 and #5 above, provide documents or a list of information identifying all persons by name, last known home address and telephone number, and social security number, who were:**

a. **terminated because of an inability to pass any test or variation,**

b. **reassigned and/or transferred because of an inability to pass any test or variation,**

c. **not hired because of an inability to pass any test or variation,**

d. **not promoted because of an inability to pass any test or variation.**

Response: Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further

object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC' s use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

Respondents further object to this request as it would require Respondents to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt Respondents' normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees and is not actively tracked and/or maintained by Respondents. It would be unduly burdensome for Respondents to produce the requested information as it would require Respondents to categorize, classify and identify information regarding its employees on a person-by-person basis.

McLane Sunwest has already provide [sic] information to allow the EEOC to analyze the validity of the IPCS test. Respondents are willing to work with

the EEOC to provide any other reasonable information needed.

Request 11. **For each person identified in 11(a) through 11(d) [sic], provide documents which reflect:**

a. **date of termination, reassignment, transfer, not hired or not promoted,**

b. **name and title of the individual who made the decision to terminate, reassign, transfer, not hire and/or not promote the person based on test results.**

Response: Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

Respondents further object to this request as it would require Respondents to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt Respondents' normal business operations and cause significant monetary expense to Respondents that would

outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees and is not actively tracked and/or maintained by Respondents. It would be unduly burdensome for Respondents to produce the requested information as it would require Respondents to categorize, classify and identify information regarding its employees on a person-by-person basis.

McLane Sunwest has already provide [sic] information to allow the EEOC to analyze the validity of the IPCS test, and Respondents are willing to work with the EEOC to provide any other reasonable information needed.

***Request 12*: For each test or variation identified in #4 or #5, provide any and all documents evidencing any change, whether a reduction or increase, in workplace injuries.**

***Response*:** Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing

as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test. McLane is in the process of compiling and analyzing certain data relating to this request and Respondents are willing to confer with the EEOC as to an appropriate scope of production relating thereto.

Request 13. **From January 1, 2006 to the present, if Respondent received any formal or informal complaints by any employee other than Charging Party concerning the test(s), or any claims of discrimination based on sex and/or disability, submit documents evidencing the following;**

a. **name and job title of each person who complained,**

b. **name and job title of each person receiving each complaint,**

c. **date of each complaint,**

d. **any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,**

e. **record of all actions taken by your organization in response to each**

f. **complaint, including copies of all remedial actions taken.**

Response: McLane Sunwest produced on January 14, 2011 a list of complaints that were received from employees in the grocery division alleging discrimination based on the use of the IPCS test. Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the terms "complaints" and "test." Respondents object to this unlimited request for any and all testing and any complaint—formal or informal and regardless of the complaint—as a fishing expedition constituting an abuse of process by the EEOC. Without knowing the scope of the EEOC's investigation or any reasonable basis therefore, Respondents cannot reasonably respond to this request.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

Request 14. **Provide documents or a list* of all individuals who applied for a position, for which the test identified in #4 and #5 above was in use, at any location or facility of Respondent during the relevant time period. Include:**

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

g. whether the applicant was hired, and date and reason for hire or non-hire

h. location at which they applied and

i. position for which they applied.

***Response*:** Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC' s use of the terms "relevant time period" and "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

Respondents further object to this request as it would require Respondents to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Respondents' normal business operations and cause significant monetary expense to Respondents that would

outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees and is not actively tracked and/or maintained by Respondents. It would be unduly burdensome for Respondents to produce the requested information as it would require Respondents to categorize, classify and identify information regarding its employees on a person-by-person basis.

Request 15. **Provide documents or a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #4 and #5 above was in use, at any and** [sic] **location or facility of Respondent from January 1, 2006 to the present. Include:**

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date promotion sought

g. whether the individual seeking promotion was selected, and, if so, date and reason for selection or nonselection

h. location at which they sought promotion and

i. position for which they sought promotion,

Response: Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

Respondents further object to this request as it would require Respondents to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt Respondents' normal business operations and cause significant monetary expense to Respondents that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees and is not actively tracked

and/or maintained by Respondents. It would be unduly burdensome for Respondents to produce the requested information as it would require Respondents to categorize, classify and identify information regarding its employees on a person-by-person basis.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

Request 16. **Provide documents or a list* of all individuals who were employed by Respondent at any location or facility nationwide from January 1, 2006 to the present. The documents or list should be separated for each facility/location nationwide and include:**

a. **name**

b. **social security number**

c. **last known home address and telephone number**

d. **sex**

e. **medical condition(s)**

f. **date of hire**

g. **all position titles held**

h. **dates when each position title was held**

i. **termination date and reason, if applicable.**

Response: Respondents object to this request as irrelevant, overly broad, unduly burdensome, and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous. Respondents object to this unlimited request for employment information for all of its employees nationwide and the reasons for any of their terminations as a fishing expedition constituting an abuse of process by the EEOC.

Respondents further object to this request as it would require Respondents to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt Respondents' normal business operations and cause significant monetary expense to Respondents that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees and is not actively tracked and/or maintained by Respondents. It would be unduly burdensome for Respondents to produce the requested information as it would require Respondents to categorize, classify and identify information regarding its employees on a person-by-person basis.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

***Request 17*: Provide complete copies of the personnel files, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by him or her, complaints made about him or her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination for Bobby Carlson (President), Theresa Hatch (Human Resources Manager) and Janann Williams (Vice President, People).**

***Response*:** Respondents object to the request for the personnel files of Bobby Carlson, Theresa Hatch, and Janann Williams on the grounds that it seeks information and/or documents that are not relevant to the Charge under investigation nor any aspect of any Charging Party's current or former employment with the company, and therefore are not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related thereto the allegations in the Charge filed with the EEOC. Further, the production of Mr. Carlson's, Ms. Hatch's, and Ms. Williams' personnel files would require the Company to produce confidential information and/or documents concerning McLane Sunwest's employees.

Request 18. **List any and all alternatives to the ICPS** [sic] **or IPCT test that Respondent considered implementing in lieu of the ICPS** [sic] **or IPCT test. Include:**

a. **copies of all documents Respondent reviewed in considering any such alternatives.**

b. **copies of all documents relating to any findings, analyses, or determinations made by Respondent regarding any such alternatives.**

Response: Respondents object to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondents. Respondents further object to this request as seeking confidential information. Respondents object to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." Respondents object to this unlimited request for any and all testing mechanisms considered as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, Respondents have been willing to provide information to allow the EEOC to analyze the validity of the IPCS test.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Subpoena be revoked in its entirety or withdrawn and modified to avoid the

burdensome and expensive production of the vast amount of information sought on a nationwide basis. As illustrated by McLane Sunwest's previous responses to the EEOC's requests for information, Respondents are committed to working with the EEOC to provide relevant information and to further produce information in a less burdensome procedure.

The scope of the current Subpoena, however, is simply too broad and burdensome—particularly given that the EEOC has not analyzed the validity of the test which could render moot the need for much of the information sought in the Subpoena.

Sincerely,

SNELL & WILMER

/s/ Ashley Kasarjian
Joshua R. Wood[ ]ard
Ashley T. Kasarjian

MORGAN, LEWIS &
BOCKIUS L.L.P.

/s/ Ellen Perlioni/
with permission
Ronald E. Manthey
Ellen L. Perlioni

cc: Barbara Rusden
EEOC, Investigator
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012
Barbara.Rusden@EEOC.gov

[Attachment A Omitted Here
And May Be Found At JA 92-106.]

ATTACHMENT B

Ochoa v. McLane Sunwest— Documents Produced to EEOC

Ex. No.	Description	Disclosed through
1	Charge of discrimination filed by Damiana Ochoa, dated January 7, 2008 (Ex. 1 to Position Statement)	Pos. Stmt., 4/25/08
2	EEO Policy (Ex. 2 to Position Statement)	Pos. Stmt., 4/25/08
3	EEO Handbook Provision (Ex. 3 to Position Statement)	Pos. Stmt., 4/25/08
4	Safety Program (Ex. 4 to Position Statement)	Pos. Stmt., 4/25/08
5	Signed receipt of handbook (Ex. 5 to Position Statement)	Pos. Stmt., 4/25/08
6	Damiana Ochoa's employment application (Ex. 6 to Position Statement)	Pos. Stmt., 4/25/08

7	GMSI Job Task Analysis re Selector Mezzanine Selector (Ex. 7 to Position Statement)	Pos. Stmt., 4/25/08
8	Job categories with lifting specifications (Ex. 8 to Position Statement)	Pos. Stmt., 4/25/08
9	Physical demands strength definitions (Ex. 9 to Position Statement)	Pos. Stmt., 4/25/08
10	FMLA request granted to Damiana Ochoa (Ex. 10 to Position Statement)	Pos. Stmt., 4/25/08
11	FMLA policy (Ex. 11 to Position Statement)	Pos. Stmt., 4/25/08
12	Pre/Post employment physical requirements policy (Ex. 12 to Position Statement)	Pos. Stmt., 4/25/08
13	Notice to all applicants for employment (Ex. 13 to Position Statement)	Pos. Stmt., 4/25/08
14	Physical capability services manual (Ex. 14 to Position Statement)	Pos. Stmt., 4/25/08

15	T. Abram Ltr., dated January 14, 2005 (Ex. 15 to Position Statement)	Pos. Stmt., 4/25/08
16	Sample job task analysis report (Ex. 16 to Position Statement)	Pos. Stmt., 4/25/08
17	Sample results—IPCS (Ex. 17 to Position Statement)	Pos. Stmt., 4/25/08
18	Safety intervention for wrist and forearm pain (Ex. 18 to Position Statement)	Pos. Stmt., 4/25/08
19	Injury statement (Ex. 19 to Position Statement)	Pos. Stmt., 4/25/08
20	Accident/incident investigation report (Ex. 20 to Position Statement)	Pos. Stmt., 4/25/08
21	IPCS results, dated November 11, 2007 (Ex. 21 to Position Statement)	Pos. Stmt., 4/25/08
22	IPCS results, dated November 19, 2007 (Ex. 22 to Position Statement)	Pos. Stmt., 4/25/08
23	IPCS results, dated December 27, 2007 (Ex. 23 to Position Statement)	Pos. Stmt., 4/25/08

24	Termination document, dated January 9, 2008 (Ex. 24 to Position Statement)	Pos. Stmt., 4/25/08
25	Chart re IPCS rating and job task analyses (Ex. 25 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
26	Information re "The IPCS Score—What Is It?" (Ex. 26 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
27	Physical Capability Evaluation Proposal Presented to Company (Ex. 27 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
28	The Effectiveness of the IPCS Physical Capability Evaluation Process for McLane Food Service Company A Validation Study by Thomas B. Gilliam (Ex. 28 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

29	Injury Analysis to Determine the Effectiveness of the IPCS (Ex. 29 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
30	T. Abram Ltr., dated April 21, 2008 (Ex. 30 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
31	T. Abram Ltr., dated August 23, 2002 (Ex. 31 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
32	A 24-Month Injury Analysis Comparing the New Hire IPCS Isokinetic Evaluation to the Previous 24-Months New Hire Applicants for a Clothing Retail DSC—A Pilot Program—Executive Summary (Ex. 32 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

33	A Four-Year Injury Analysis to Determine the Effectiveness of the IPCS Physical Capability Evaluation Program on Reducing Exertion Injuries For a Large Food Manufacturer (Ex. 33 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
34	A 35-Month Injury Analysis Comparing the IPCS Isokinetic Evaluation to a Functional Capacity/Cardiovascular Evaluation on Reducing Injuries For Large Food Distribution Company—Executive Summary (Ex. 34 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
35	Comparing the IPCS Isokinetic Evaluation to Individuals Not T sted for a Major L-T-L Trucking Company—Executive Summary (Ex. 35 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

36	A Two Year Injury Analysis To Determine the Effectiveness of the IPCS Physical Capability Evaluation Program on Reducing Injuries for: The World's Largest Food Producer (Ex. 36 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
37	A 19-Month Injury Analysis Comparing the IPCS Isokinetic Evaluation to a Functional Capacity/Cardiovascular Evaluation on Reducing Injuries For a National Food Distribution Company—Executive Summary (Ex. 37 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request,11/13/09
38	A Comprehensive Analysis and Case Study for A Large US Logistics Trucking Company Showing Injury Rates and Injury Costs Comparing IPCS Tested Employees to Employees Not Tested Over a 3-year Period (Ex. 38 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

39	Data re Employees re Testing, Job Class and Level Achieved (Ex. 39 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
40	Chart detailing positions (Ex. 40 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
41	GMSI Job Task Analysis re Damages & Returns (Ex. 41 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
42	GMSI Job Task Analysis re Mezzanine Selector (Ex. 42 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
42A	GMSI Job Task Analysis re Cigarette Selector (Ex. 42A to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

42B	GMSI Job Task Analysis re Cigarette Stamper (Ex. 42B to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
42C	GMSI Job Task Analysi re GMP Selector (Ex. 42C to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
42D	GMSI Job Task Analysis re Candy Repack (Ex. 42D to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
42E	GMSI Job Task Analysis re Single Cell Grocery (Ex. 42E to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
43	GMSI Job Task Analysis re Sanitation (Ex. 43 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

44	GMSI Job Task Analysis re Hand Stamper (Ex. 44 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp, to EEOC request, 11/13/09
45	GMSI Job Task Analysis re Merchandiser (Ex. 45 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
46	GMSI Job Task Analysis re Yard Spotter (Ex. 46 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
47	GMSI Job Task Analysis re Forklift Replenishment (Ex. 47 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
48	GMSI Job Task Analysis re Delivery Driver (Ex. 48 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

49	GMSI Job Task Analysis re Full Case Selector (dry goods) (Ex. 49 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
50	GMSI Job Task Analysis re Full Case Loader (Ex. 50 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
51	GMSI Job Task Analysis re Stocker (Ex. 51 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
52	GMSI Job Task Analysis re Maintenance-DC Mechanic (Ex. 52 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
53	GMSI Job Task Analysis re Mechanic (Ex. 53 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

54	GMSI Job Task Analysis re Inventory Control (Ex. 54 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
55	Damiana Ochoa Employee File (Ex. 55 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
56	Industrial Physical Capability Services, Inc. for McLane Grocery Division (Ex. 56 to response to EEOC request, Ltr, from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
57	Article re "Move It. Lose it. Love Healthy. Achieve a Healthier Workplace One Employee at a Time!" by Thomas Gilliam and Jane Neill (Ex. 57 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
58	IPCS Advisement Letter (Ex. 58 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

59	IPCS Return to Work Letter (Ex. 59 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
60	Pre-employment Functional Capabilities Evaluation (Ex. 60 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
61	Physical Capability Strength Test: One Component of the New Hire Selection Process (Ex. 61 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
62	IPCS Physical Capability Strength Test (Ex. 62 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
63	Guidelines for Physical Capability Assessment (Ex. 63 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09

64	Industrial Physical Capability Services, Inc. Applicant Information Page (Ex. 64 to response to EEOC request, Ltr. from A. Kasarjian dated 11/13/09)	Resp. to EEOC request, 11/13/09
65A	Equal Employment Opportunity Policy, dated July 2005 (Ex. 65A to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11[1]
65B	Equal Employment Opportunity Policy, dated September 2008 (Ex. 65B to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
65C	Equal Employment Opportunity Policy, dated January 2010 (Ex. 65C to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

[1] The EEOC's second request was withdrawn by the EEOC and replaced by the request dated November 9, 2010.

65D	Equal Employment Opportunity Policy, dated February 2010 (Ex. 65D to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
65E	Equal Employment Opportunity Policy, dated September 2010 (Ex. 65E to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
66A	Harassment/Sexual Harassment/Investigating and Resolving Complaints Policy, dated July 2005 (Ex. 66A to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
66B	Harassment/Sexual Harassment/Investigating and Resolving Complaints Policy, dated September 2008 (Ex. 66B to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

66C	Harassment/Sexual Harassment/Investigating and Resolving Complaints Policy, dated January 2010 (Ex. 66C to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
66D	Harassment/Sexual Harassment/Investigating and Resolving Complaints Policy, dated February 2010 (Ex. 66D to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
66E	Harassment/Sexual Harassment/Investigating and Resolving Complaints Policy, dated September 2010 (Ex. 66E to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
67A	Safety Policy, dated July 2005 (Ex. 67A to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

67B	Safety Policy, dated September 2008 (Ex. 67B to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
67C	Safety Policy, dated January 2010 (Ex. 67C to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
67D	Safety Policy, dated February 2010 (Ex. 67D to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
67E	Safety Policy, dated September 2010 (Ex. 67E to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
68A	Leave of Absence Policy, dated July 2005 (Ex. 68A to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

68B	Leave of Absence Policy, dated September 2008 (Ex. 68B to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
68C	Leave of Absence Policy, dated February 2009 (Ex. 68C to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
68D	Leave of Absence Policy, dated January 2010 (Ex. 68D to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
68E	Leave of Absence Policy, dated February 2010 (Ex. 68E to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
68F	Leave of Absence Policy, dated September 2010 (Ex. 68F to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/1

69A	Communication and Conduct Policy, dated July 2005 (Ex. 69A to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
69B	Communication and Conduct Policy, dated September 2008 (Ex. 69B to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
69C	Communication and Conduct Policy, dated July 2009 (Ex. 69C to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
69D	Communication and Conduct Policy, dated January 2010 (Ex. 69D to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
69E	Communication and Conduct Policy, dated February 2010 (Ex. 69E to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

69F	Communication and Conduct Policy, dated September 2010 (Ex. 69F to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
70	GMSI Job Task Analysis re Checker (Ex. 70 to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
71	GMSI Job Task Analysis re Forklift Dock Hauler (Ex. 71 to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
72	GMSI Job Task Analysis re Full Case Loader (Ex. 72 to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
73	GMSI Job Task Analysis re Heavy Selector (Ex. 73 to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

74	GMSI Job Task Analysis re Light Selector (Ex. 74 to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11
75	GMSI Job Task Analysis re Team Lead (Ex. 75 to response to EEOC request, Ltr. from A. Kasarjian dated 1/14/11)	Resp. to EEOC third request, 1/14/11

ATTACHMENT C

EEOC Form 136
(10/94)

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

SUBPOENA

TO: Grady Rosier, President/CEO NO: PHX-11-33
McLane Company
4747 McLane Parkway
Temple, TX 76504

IN THE MATTER OF: EEOC v. McLane Company

Charge No. 540-2010-01761

Having failed to comply with previous request(s) made by or on behalf of the undersigned Commission official,

YOU ARE HEREBY REQUIRED AND DIRECTED TO:

☐ Testify before: ☐ Produce and bring * or
☒ Mail * the documents described below to:

☐ Produce access to the evidence described below for the purpose of examination or copying to:

Investigator Barbara Rusden of the Equal Employment Opportunity Commission

at 3300 N. Central Ave., Ste. 690, Phoenix, AZ 85012 on March 9, 2011 at 4:00 p.m. o'clock

The evidence required is

See Attachments A and B which are incorporated herein by reference.

cc: Bobby Carlson, McLane Sunwest
Ronald E. Manthey, Morgan Lewis

This subpoena is issued pursuant ☐ (Title VII) 42 U.S.C. 2000e-9 ☒ (ADEA) 29 U.S.C. 626(a) ☐ (EPA) 29 U.S.C. 209 ☐ (ADA) 42 U.S.C. 12117(a)

ISSUING OFFICIAL
(Typed name, title and address) ON BEHALF OF THE COMMISSION

[SEAL]

Rayford O. Irvin,
District Director
330 N. Central Ave.,
Ste. 690
Phoenix, AZ 85012 /s/ Rayford O. Irvin 11 FEB 2011
Date

*NOTICE TO PERSON SUBPOENAED—The Commission will not pay witness fees or travel expenses for the delivery of required documents to a Commission office unless the box "Testify before" is also checked on the subpoena.

[Subpoena Proof Of Service Omitted]

ATTACHMENT A TO PHX-11-33

If Respondent withholds any evidence or document in responding to this subpoena, Respondent is instructed to provide a detailed description of the evidence or document withheld and the specific basis upon which it is being withheld,

"Evidence" shall mean any information whether presently compiled in documentary form or capable of being compiled and which exists in any form, including but not limited to that information which may exist in the minds of supervisors or workers. See Equal Employment Opportunity Commission v. Maryland Cup Corp., 785 F.2d 471 (4th Cir. 1986)

"Documents" or "Documentary Form" shall mean and include all written, printed, typed, graphic material, computer files or other tangible mediums of reproduction or communication, of every kind and description, however produced or reproduced, by whomever prepared, to whomever addressed, which are in possession, custody, or control of the person or entity to which

this Subpoena is directed or to which such person or entity has, has had, or can obtain access. Further, the term "documents" includes any copies or documents which are not identical duplicates of the originals, including, but not limited to, all drafts of whatever date, copies with typed or handwritten notations, and copies of documents the originals of which are not in the possession, custody, or control of the person or entity to which the Subpoena is directed.

Date 11 FEB 2011 /s/ Rayford O. Irvin

Rayford O. Irvin, District Director
Equal Employment
Opportunity Commission
330 N. Central Avenue, Suite 690
Phoenix, AZ 85012

ATTACHMENT B TO PHX-11-33

Respondent: McLane Company, Inc. (all facilities/ locations nationwide including corporate)

1. Documents which reflect the name, title, address and telephone number of the person to whom further inquiries should be directed.

2. Documents which reflect the correct legal name and business address of the Respondent and describe the nature of Respondent's business. Include any and all trade names, d/b/a's, or former names. Also include documentation either already

in existence or prepared by Respondent in response to this request that describes or provides the following information:

a. the type of corporate or business entity

b. approximate number of employees during each calendar year during the relevant time period

c. location of corporate headquarters

d. current status of the corporation, i.e. active, inactive, or another status

e. the name of Respondent's corporate officers, directors, and owners

f. the statutory agent for Respondent in Arizona

g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

   i. Provide the legal name and business address of all superior and subordinate business entities identified.

   ii. Provide the statutory agent for all superior and subordinate business entities identified.

3. Documents which reflect liability insurance that will provide coverage for this charge.

4. Submit copies of any and all employee handbooks in effect from January 1, 2006 to the present and

a. provide documents which reflect in detail how this information is disseminated to employees, and

b. provide documents which reflect the date when any employee handbook went into effect, and the dates of any revisions.

5. Documents which reflect or a list identifying each test used by Respondent from January 1, 2006 to the present, including but not limited to Industrial Physical Capability Strength test (IPCS) and Isokinetic Physical Capability Test (IPCT), and provide documents which reflect any variations of each test in use.

a. For each test variation, provide documents which reflect or a list which identifies all jobs or job classifications for which it has been used.

b. List all alternative names used to describe or refer to each test and variation.

6. For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #5 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:

a. provide documents which reflect how the test was developed and how it is used by Respondent,

b. provide documents which reflect the name of each tests or variation's author or creator; the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

c. provide documents which describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the process. Include copies of all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include copies of any and all documents reviewed by any key decision makers in addition to paragraph 7 below,

d. provide documents which reflect the effective dates of use of each test or variation at each of Respondent's locations,

e. provide documents which reflect any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for individual(s) who administer the test and individual(s) who take the test,

f. provide documents which reflect a description of how each test or variation is administered and scored. Include documents which reflect a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

g. provide documents which reflect or a list of all jobs and job classifications for which any test or variation is used;

h. for each job or job classification for which a test or variation is used, provide documents which identify the specific test or variation (listed in response to paragraph 5) used for that job or job classification,

i. for each job or job classification for which a test or variation is used, provide documents which identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide documents which reflect the details on the process by which any scoring/classification system was established, and provide documents which reflect the details about the process by which Respondent determined the minimum score considered "passing."

j. for each job or job classification for which a test or variation is used, provide copies of the job descriptions.

k. provide copies of any and all adverse impact studies performed for each test or variation.

7. Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #5 and #6 above, to include any notes or other documents concerning development and implementation of the test by Respondent.

8. For all positions at Respondent's facilities/locations nationwide for which any test or variation identified in #5 and #6 above is used, provide a

copy of the Job Task Analysis for each position. Include:

a. documents which reflect or a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and

b. any documents containing job analysis information for all positions wherein testing is applied to employees and/or new hires.

9. For January 1, 2006 to the present date, provide documents or a listing* of information identifying all persons who took any test or variation identified in #5 and #6 in connection with employment at any of Respondent's locations or facilities nationwide. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

---

* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

e date of application

f date of hire (or promotion), and job classification at hire (or promotion)

g test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

h. position held at the time test was administered (for individuals employed at the time or returning to work)

i position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

j reason why test was administered to each person tested

k. date and reason for termination (if applicable)

l. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

10 Provide documents which reflect or a list of all Respondent's facilities and locations in existence from January 1, 2006 to the present.

11. For all Respondent facilities/locations nationwide from January 1, 2006 to the present and with respect to any test or variation identified in #5 and #6 above, provide documents or a list* of information identifying all persons by name, last known home address and telephone number, and social security number, who were:

a. terminated because of an inability to pass any test or variation,

b. reassigned and/or transferred because of an inability to pass any test or variation,

c. not hired because of an inability to pass any test or variation,

d. not promoted because of an inability to pass any test or variation,

12. For each person identified in 11(a) through 11(d), provide documents which reflect:

a. date of termination, reassignment, transfer, not hired or not promoted,

b.. name and title of the individual who made the decision to terminate, reassign, transfer, not hire and/or not promote the person based on test results.

13. For each test or variation identified in #5 or #6, provide any and all documents evidencing any change, whether a reduction or increase, in workplace injuries.

14. From January 1, 2006 to the present, if Respondent received any formal or informal complaints by any employee concerning the test(s), or any claims of discrimination based on age, submit documents evidencing the following:

a. name and job title of each person who complained,

b. name and job title of each person receiving each complaint,

c. date of each complaint,

d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken,

15. Provide documents or a list* of all individuals who applied for a position, for which the test identified in #5 and #6 above was in use, at any location or facility of Respondent from January 1, 2006 to the present. Include:

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. date of application

f. whether the applicant was hired, and date and reason for hire or non-hire

---

* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

g location at which they applied and

h position for which they applied.

16. Provide documents or a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #5 and #6 above was in use, at any and location or facility of Respondent from January 1, 2006 to the present. Include:

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. date promotion sought

f. whether the individual seeking promotion was selected, and, if so, date and reason for selection or non-selection

g. location at which they sought promotion and

h. position for which they sought promotion.

17. Provide documents or a list* of all individuals who were employed by Respondent at any location or

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* The data should be provided on compact disk. It may be written in one of the following formats; Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

facility nationwide from January 1, 2006 to the present. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. date of hire

f. all position titles held

g. dates when each position title was held

h. termination date and reason, if applicable.

18. List any and all alternatives to the ICPS [sic] or IPCT test that Respondent considered implementing in lieu of the ICPS [sic] or IPCT test. Include:

a. copies of all documents Respondent reviewed in considering any such alternatives.

b. copies of all documents relating to any findings, analyses, or determinations made by Respondent regarding any such alternatives.

[Doc. 2-1]

EXHIBIT 14

BEFORE THE UNITED STATES
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

IN THE MATTER OF

Damiana Ochoa,

Charging Party,

v.

McLane Sunwest

Respondents and Petitioners,

CHARGE NO.
540-2008-01093

SUBPOENA NO.
PHX-11-32

PETITIONERS' ATTORNEYS

Ashley T. Kasarjian
Joshua R. Woodard
Snell & Wilmer LLP
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004

FINAL DETERMINATION ON PETITION TO REVOKE OR MODIFY SUBPOENAS

Pursuant to its Procedural Regulations, 29 C.F.R. § 1601.16(b) and Section 24.12 of the EEOC Compliance Manual, the Equal Employment Opportunity Commission ("EEOC" or "Commission") issues this Final Determination.

I. BACKGROUND

A. Brief History of Charge

In January 2008, Charging Party Damiana Ochoa filed a charge alleging that Respondent McLane Sunwest violated Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, by discriminating against her on the basis of sex and pregnancy. Ms. Ochoa asserted that because she took a pregnancy leave, Respondent would not allow her to return to work unless she passed a physical capability strength test referred to as the "Industrial Physical Capability Strength Test" or "IPCS." Because she failed to pass the "IPCS" test, she was terminated from her position as a cigarette selector—a position she had previously held for over eight years. Ms. Ochoa further asserted that Respondent violated the Americans with Disabilities Act by not allowing employees who took medical leave to return to work unless they passed the IPCS test and by requiring all new hires to pass the test. *See* Exhibit 1, Charge of Discrimination filed by Damiana Ochoa. During the EEOC's investigation of Ms. Ochoa's Charge, information was discovered regarding the company-wide use of the IPCS test in McLane's Grocery and Food Services divisions. On August 6, 2010, the Director of the Phoenix District Office directed that a nationwide investigation be conducted of McLane Company pursuant to the Age Discrimination in Employment Act of 1967. On September 6, 2010, the EEOC received another Charge of Discrimination against McLane Company, which was filed with both the EEOC and the California Department of Fair

Employment and Housing. The Charging Party alleged that McLane Company discriminated against him on the basis of his disability by requiring him to take an isokinetic test and not allowing him to return to work.

On November 9, 2010, the EEOC advised Respondent that it was broadening the scope of its investigation of Ms. Ochoa's Charge to all McLane facilities nation-wide. Subsequently, on August 9, 2011, the EEOC received yet another charge of discrimination against McLane. The Charging Party alleged that McLane discriminated against her on the basis of her gender, disability, and her age by terminating her employment because she was unable to pass a physical test after a leave of absence.

B. Evidence Requested in the Subpoena

As part of the investigation of Ms. Ochoa's Charge, the EEOC Investigator sought documents relevant to allegations that Respondent's policies and practices regarding physical strength tests resulted in discrimination on the basis of sex, pregnancy, and disability. On February 15, 2011, after issuing Requests for Information, the EEOC issued administrative subpoena No. PHX-11-32. *See* Exhibit 2. The EEOC and Respondent have met and conferred in an effort to resolve disagreements regarding the subpoena. The categories of documents upon which agreement could not be reached and which are the subject of this determination, generally fall into two categories: (1) lists of employees and applicants who were terminated, demoted, or not hired

because they failed to pass the IPCS test, including names, last known addresses, phone numbers, and social security numbers for those employees and applicants (Request Nos. 10, 11a., 14, 15); (2) data regarding employees and applicants who took the test, including:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

g. date of hire (or promotion), and job classification at hire (or promotion)

h. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

i. position held at the time test was administered (for individuals employed at the time or returning to work)

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

(Request Nos. 8a-l). Although Respondent has provided nationwide data regarding the gender and test passage of the employees who took the test in the grocery division, it has failed to provide the names, social security numbers, addresses and phone number of employees and applicants and has also failed to provide information regarding medical condition, date of application, date of hire and job classification at hire, test score and sub-test scores, reason for termination, and position held at the time the test was administered.

C. Respondent's Objections to the Subpoenas

Under the administrative provisions of 29 C.F.R. § 1601.16(b)(1), Respondent has moved to revoke or modify Subpoena No. PHX-11-32. *See* Exhibit 3. First, Respondent objects that a subpoena issued in the investigation of the EEOC's ADEA Charge is nearly identical to the subpoena at issue here, which is sought as part of an investigation of Ms. Ochoa's Charge. Second, Respondent objects that the EEOC seeks information that would require data compilation, and is irrelevant, overbroad, unduly burdensome, confidential, an abuse of process and issued solely to harass Respondent. In particular, Respondent raises this second category of objections in response to the EEOC's requests for employee lists with the names, last known addresses, phone numbers, and social security numbers of employees. Each of these objections will be addressed in turn, below.

II. ANALYSIS

The EEOC is specifically authorized by statute to conduct investigations to determine if employment discrimination is being committed or has occurred. 42 U.S.C. § 2000e-5 and 42 U.S.C. §2000e-8(a). Title VII grants the EEOC broad investigatory powers, providing that the Commission "shall . . . have access to . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation." 42 U.S.C. §2000e-8(a). The Ninth Circuit has explained the necessity for a broad scope of EEOC investigations, stating:

> [T]he EEOC must be permitted to investigate the full picture of Recruit's and Interplace's recruitment and internal hiring practices. We therefore decline the companies' invitation to straitjacket the EEOC into an artificially narrow survey of [information]. Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation.

EEOC v. Recruit U.S.A. Inc., 939 F.2d 746, 756-57 (9th Cir. 1991) (citations omitted).

A. The Information Sought Is Within the EEOC's Investigative Authority

Respondent objects that the subpoena issued in the EEOC's investigation of Ms. Ochoa's Charge subpoena is nearly identical to the subpoena issued under

the EEOC's ADEA Directed Charge. However, the central issue is not whether overlapping information is requested in the subpoenas, but rather whether the information sought under the Ochoa Charge is within the scope of the EEOC's investigative authority.

While the EEOC's investigative authority is not unlimited, the information sought must only be "relevant to the charge under investigation." Section 709(a), 42 U.S.C. §2000e-8(a). The relevance requirement is "generously" construed, "afford[ing] the Commission access to virtually *any* material that *might* cast light on the allegations against the employer." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984) (emphasis added). *also EEOC v. Federal Express Corp.*, 558 F.3d 842, 854 (9th Cir. 2009) ("Relevancy is determined in terms of the investigation rather than in terms of evidentiary relevance"); *EEOC v. Cambridge Tile Mfg. Co.*, 590 F.2d 205, 206 (6th Cir. 1979) (per curiam) (EEOC may subpoena documents "concerning any employment practice which may shed light on the discrimination charged"); *accord EEOC v. Franklin & Marshall Coll.*, 775 F.2d 110, 115-115 (3d Cir. 1985), *cert. denied*, 475 U.S. 1163 (1986).

Here, the information sought in the subpoenas issued under the Ochoa Charge and the ADEA Charge are not identical because they seek information relating to different protected categories; however, both subpoenas seek overlapping information relating to Respondent's testing policies and practices. The Ochoa Charge specifically alleges that Respondent's testing

practices are discriminatory, therefore, information regarding the implementation of testing policies and practices falls well within the EEOC's authority to investigate the Ochoa Charge.[1] Regardless of whether overlapping information is sought under the ADEA Directed Charge, the EEOC has broad authority to seek information regarding McLane's testing practices under the Ochoa charge.

B. The Subpoena Is Not Unduly Burdensome or an Abuse of Process

Respondent objects that the EEOC seeks information that would require data compilation that is unduly burdensome, irrelevant, overbroad, confidential, an abuse of process and issued solely to harass Respondent. First, with respect to Respondent's objections that data compilation is unduly burdensome, the Commission has the right to subpoena "[t]he production of evidence, including but not limited to, books,

---

[1] Investigation of McLane's testing practices also fall within the scope of the ADEA Directed Charge. Respondent erroneously refers to the ADEA Directed Charge as a "Commissioner's Charge," and asserts that the EEOC failed to explain why it is justified. However, the ADEA gives the EEOC authority to investigate and enforce independent of individual employee charges. *EEOC v. American & Efird Mills, Inc.*, 964 F.2d 300,304 (4th Cir.1992); *see* 29 C.F.R. §§ 1626.4, 1626.13. In fact, the Supreme Court has acknowledged the EEOC's autonomous investigative and enforcement authority under the ADEA, declaring that the agency may receive information concerning alleged violations of the ADEA from any source. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1994).

records, correspondence, or documents." 1 *EEOC Compliance Manuel* [sic] § 24.4(a) (5/92); *see also* 29 C.F.R. § 1601.16(a)(2). Courts have held that "EEOC may compel an employer to compile information within its control in order to respond to a subpoena, and the subpoena power of the EEOC is not limited to production of documents already in existence." *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1039 (10th Cir. 1993); *Maryland Cup Corp.*, 785 F.2d, at 478; *see also Shell Oil Co.*, 466 U.S., at 68-69. Indeed, the Ninth Circuit required an employer to respond to requests requiring compilation of information regarding computer databases. *EEOC v. Fed. Ex. Corp.*, 558 F.3d 842, 854-56 (9th Cir. 2009) (FedEx required to respond to subpoena and identify computerized databases in which it maintains employee information), adopting the analysis in *EEOC v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 114 (4th Cir. 1997).

Second, Respondent's relevance and overbreadth objections are based on its assertion that the EEOC is not entitled to nationwide data. However, the Ninth Circuit held in *EEOC v. Federal Express*, that when an individual charge of discrimination "raises the specter of systemic discrimination, the EEOC has the authority to investigate charges of discrimination beyond the alleged individual discrimination specifically committed against [the individual charging party]." *E.E.O.C. v. Federal Exp. Corp.*, 558 F.3d 842, 855 (9th Cir. 2009). The Ninth Circuit further held that courts should enforce a subpoena seeking company-wide data even when it is based on an individual charge because the

EEOC "plainly has jurisdiction to seek company-wide data." *Id; see also, E.E.O.C. v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1039 (10th Cir. 1993), *citing EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir. 1975), cert. denied, 423 U.S. 994 (1975) (upholding EEOC's subpoena for information outside the scope of the specific charge, recognizing EEOC seeks to "vindicate the public interest, which is broader than the interest of the charging parties").

Here, McLane implements the Industrial Physical Capability Strength test nation-wide. Because the test is alleged to be discriminatory and it is used by McLane nationwide, it raises the specter of systemic discrimination. *Federal Exp.*, 558 F.3d at 855. Additionally, the Commission has already notified McLane that it is broadening the scope of its investigation of Ms. Ochoa's Charge to all McLane facilities nation-wide. Therefore, the enforcement of a subpoena for company-wide data is warranted in this case.

Third, with regard to Respondent's concern about the confidentiality of the information, the plain statutory language of Title VII requires the EEOC not to disclose information obtained during an investigation. 42 U.S.C. § 2000e-8(e) states:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any

> officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

Accordingly, during the investigative stage, the Commission is bound by law to protect any privacy right Respondent and its employees may have in the requested information. Failure to do so subjects EEOC employees to fines and possibly imprisonment. To abide by this law, the EEOC takes extensive measures to safeguard confidentiality. For example, the Commission redacts social security numbers and dates of birth when responding to Freedom of Information Act Requests. Therefore, Respondent's concern is adequately addressed by the penalties provided under Title VII.

Fourth, Respondent asserts that the EEOC is engaged in a fishing expedition that constitutes an abuse of process. As set forth above in Section II(A), the central issue is whether the information sought is relevant to the Charge under investigation. The Ninth Circuit has ruled that the scope of information considered relevant under this standard is "quite broad." *EEOC v. Recruit U.S.A. Inc.*, 939 F.2d 746, 756 (9th Cir. 1991). Moreover, the EEOC's assessment of relevance is entitled to deference so long as it is not "'obviously wrong.'" *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110,

113 (4th Cir. 1997) (quoting *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992)). The Tenth Circuit has additionally clarified:

> Although the Supreme Court has advised that the relevance standard must not be interpreted so broadly as to render the statutory language a "nullity," we have explained (1) that an EEOC administrative subpoena "is enforceable even though no 'probable cause' has been shown," (2) that even some requests we "previously considered to be administrative '*fishing expeditions*' are often permitted," and (3) that such subpoenas "may be enforced for investigative purposes unless they are plainly incompetent or irrelevant to any lawful purpose."

EEOC v. Dillon Companies, 310 F.3d 1271, 1274-75 (10th Cir. 2002) (citations omitted) (emphasis added).

Fifth, Respondent provides no explanation or evidence for its allegations that the subpoena is issued solely to harass Respondent. Ms. Ochoa's Charge challenges a nationwide policy, pattern, or practice which effectively prohibits employment of individuals who, like Ms. Ochoa, failed a physical strength test. Ms. Ochoa had worked as an employee for eight years before the test effectively foreclosed her ability to return to work. Given the gravity of the consequences of failing such tests, and Respondent's nationwide use of the tests, the Commission's investigation is both warranted and justified.

1. The Commission is Entitled To Obtain Employee and Applicant Lists

Based on the objections set forth in section I(C), Respondent has refused to provide the names, last known addresses, phone numbers, and social security numbers of employees and applicants, including employees who were terminated or demoted because they failed to pass the IPCS test. The employee and applicant lists are relevant to identifying witnesses, comparative parties, and/or individuals who may have been subjected to disparate impact or treatment by Respondent. Additionally, because the Commission is investigating whether Respondent violated the ADA, employee and applicant lists are undeniably relevant to identifying individuals with disabilities who failed to pass the IPCS test and conducting data analysis regarding the test performance of those individuals. Employee and applicant lists are well within the scope of information which "might cast light" upon the EEOC's investigation of whether Respondent's testing practices are discriminatory. *See Shell Oil Co.*, 466 U.S. at 68-69. Although Respondent asserts that it would have to engage in data compilation, as set forth above, the "EEOC may compel an employer to compile information within its control." *Citicorp Diners Club, Inc.*, 985 F.2d at 1039. Additionally, Respondent has already provided data regarding employees but has designated an employee number for employees rather than disclosing their names. The additional effort required to designate employee numbers undermines Respondent's argument that it cannot identify employees.

Respondent additionally objects that an employee list would require disclosure of confidential information. However, as set forth above, "confidentiality is no excuse for noncompliance since Title VII imposes criminal penalties for EEOC personnel who publicize information obtained in the course of investigating charges of employment discrimination." *Equal Employment Opportunity Commission v. Bay Shipbuilding Corp.*, 668 F.2d 304, 312 (7th Cir. 1981) (citing 42 U.S.C. ss [sic] 2000e-5(b), 2000e-8(e)) *see also, Equal Employment Opportunity Commission v. Associated Dry Goods Corp.*, 449 U.S. 590, 604 (1981) (Respondent does not have categorical right to refuse to comply with the EEOC subpoena based on concerns that the information supplied would not be held in absolute secrecy.). Similarly, the United States Supreme Court has rejected the notion that a showing of more than relevance is required as a condition of obtaining confidential materials in the peer review setting. *EEOC v. University of Penn.*, 493 U.S. 182 (1990). Therefore, the need for confidentiality is not a valid basis to refuse to comply with an EEOC subpoena. *See University of Penn.*, 493 U.S. at 192; *Associated Dry Goods Corp.*, 449 U.S. at 603.

III. CONCLUSION

For the reasons set forth above, Respondent's Petition fails to raise objections sufficient to revoke or modify the subpoena. The information sought is within the EEOC's broad investigatory powers.

IV. DETERMINATION

Based upon the foregoing, it is determined the Petition to Revoke or Modify Subpoena No. PHX-11-32 is denied. Within twenty (20) days of the receipt of this Determination, Respondent is directed to provide the Commission with the information and tangible things requested.

On behalf of the Commission,

/s/ Bernadette B. Wilson — March 21, 2012

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

Date

[Doc. 2-1]

EXHIBIT 15

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

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400 East Van Buren Street
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DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

May 10, 2012

VIA EMAIL AND U.S. MAIL

Barbara Rusden, Investigator
Equal Employment Opportunity Commission
Phoenix District Office
3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012

Re: *Charge No.:* *548-2008-01093*
Charging Party: *Damiana Ochoa*
Respondent: *McLane Sunwest, Inc.*

Dear Ms. Rusden:

This letter is in follow up to your requests for information from McLane/Suneast, Inc. (d/b/a "McLane Sunwest"). As you know, some of the data that the EEOC requested McLane Sunwest to produce had to be collected from third-party sources. When McLane Sunwest originally collected the data from Industrial Physical Capability Services, Inc. ("IPCS"), certain duplicate entries were eliminated to make the data more user-friendly for conducting disparate impact analysis. For example, duplicate entries for the same person taking the IPCS PCE multiple times for the same reason artificially inflate the "does not meet requirement" rates.

As we have continued to analyze the data, we have discovered errors in the de-duplication. As such, we have requested new data from IPCS with no de-duplication. We wanted to promptly inform you of the issue as it may impact your analysis as well. We are working

diligently to provide updated IPCS data to the EEOC shortly.

If you have any questions, please let us know.

Sincerely,

SNELL & WILMER L.L.P.

/s/ Ashley Kasarjian
Ashley Kasarjian

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No. 15-1248

In The Supreme Court of the United States

MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX VOLUME II

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, v. McLane Company, Inc. Respondent.	Case No. 2:12-mc-00081-GMS **MCLANE COMPANY, INC.'S RESPONSE TO PETITIONER'S APPLICATION FOR AN ORDER TO SHOW CAUSE WHY AN ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED** (Filed Sep. 26, 2012)

McLane Company, Inc. ("McLane") responds in opposition to the E.E.O.C.'s Application for an Order to Show Cause Why an Administrative Subpoena Should Not Be Enforced and its Memorandum in Support of

the Application ("Application"). Seeking a second bite at the apple, the E.E.O.C. is attempting to obtain information the Court has already ruled that McLane is not required to produce in the ADEA matter (*E.E.O.C. v. McLane Company, Inc.*, 2:12-cv-00615-GMS, dkt. 25).

The E.E.O.C. initiated the subpoena that is the subject of the current Application (PHX-11-32) as part of its investigation of Ms. Damiana Ochoa's charge against her employer, McLane/Suneast, Inc. (d/b/a and hereinafter referred to as "McLane Sunwest"), alleging sex and disability discrimination. Notably absent from the E.E.O.C.'s Application is that McLane already agreed, on April 10, 2012, to provide the information that the Court ordered it to produce in the ADEA matter (2:12-cv-00615-GMS, dkt. 25)—but as to gender, in lieu of age–in response to Ms. Ochoa's allegations. The remaining items the E.E.O.C. now seeks were determined to be irrelevant and/or unduly burdensome, and were not required to be produced, even pursuant to the less stringent standard of the ADEA. For these reasons, McLane requests that the E.E.O.C.'s Application be denied. This Response is supported by the following Memorandum of Points and Authorities and supporting exhibits.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

In its Application, the E.E.O.C. seeks to obtain two categories of information:

(1) lists of employees and applicants who have been terminated, demoted, or not hired because they did not meet the minimum requirements of the IPCS PCE, including their names, last known addresses, phone numbers and social security numbers (PHX-11-32, Request Nos. 10, 11a, 14, and 15); and

(2) data of employees and applicants who took the test, including their pedigree information as follows (PHX-11-32, Request Nos. 8(a)-(1)):

> a) name, b) social security number, c) last known home address and telephone number, d) sex, e) medical condition, f) date of application, g) date of hire (or promotion), and job classification at hire (or promotion), h) test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification), i) position held at the time the test was administered (for individuals employed at the time or returning to work), j) position sought at the time test was administered (for individuals returning to work or seeking promotion or hire), k) reason why test was administered to each person tested, and l) date and reason for termination (if applicable).

See Mem. in Support of Appl., dkt. 2, 4:14-5:6.[1]

In light of the fact that McLane informed the E.E.O.C. it would voluntarily provide the information

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[1] Other requests in the Subpoena have apparently been withdrawn, similar to the EEOC's position in the ADEA matter. ADEA Order, Apr. 4, 2012, dkt. 25, 1:22-24.

it was required to produce in the ADEA matter, with gender information offered in lieu of age, this response is limited to the remaining data requested by the E.E.O.C.[2] [*See* Ex. A, Stenson supp. decl.[3] ¶ 18; Stenson supp. decl. Ex. 47.]

II. Factual Background

A. McLane's Corporate Structure

Subpoena PHX-11-32 (hereinafter the "Subpoena") is directed toward McLane Company, Inc., and all of its facilities/locations nationwide, including corporate. [Ex. B. Stenson decl. Ex. 14.] McLane is a supply chain services company that provides grocery supply chain solutions for convenience stores, mass merchants, and drug stores throughout the United States. [Ex. C, Koch decl. ¶ 4; Ex. D, Worsham decl. ¶ 5.] In addition to having several discrete operating locations, McLane also has a number of completely separate subsidiary companies. [Ex. C, Koch decl. ¶ 5.]

For example, in its "Grocery" business, McLane has several corporate subsidiaries, one of which is Ms.

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[2] As indicated in the ADEA matter, compiling this information takes a substantial amount of time and resources—even more than initially anticipated. McLane has been working diligently to identify, gather, and compile the information to produce to the E.E.O.C., and will be producing it as soon as possible. [Ex. A, Stenson supp. decl. ¶ 18.]

[3] The supplemental declaration of Ms. Suzanne Stenson is produced as Exhibit A in this Response. Ms. Stenson's initial declaration, as with all others produced in the ADEA matter, are produced as exhibits to this Response as well.

Ochoa's former employer, McLane Sunwest, which operates a distribution center in Goodyear, Arizona. McLane Sunwest is a Texas corporation with its corporate headquarters and principal place of business located in Temple, Texas. [*Id.*]

Separate from the Grocery operations is McLane Foodservice, Inc., which provides supply chain solutions for restaurants, with distribution centers around the country ("Foodservice"). [*Id.* at ¶ 6.] Foodservice is a Texas corporation with its corporate headquarters and principal place of business located in Carrollton, Texas. [*Id.*]

B. The Damiana Ochoa Charge

In its Application, the E.E.O.C. references *three* charges against McLane. Ms. Ochoa's Charge is discussed in detail. However, the E.E.O.C. only provides summaries of the two other charges. *See, e.g.*, Mem. in Support of Appl., dkt. 2, 1:20-28; 3:7-15; 4:6-10.[4] Significantly the Subpoena is directed *solely* to the matter of *Ochoa v. McLane Sunwest.* [*See* Ex. B, Stenson decl. Ex. 14.]

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[4] Summarizing charges unrelated to the Subpoena is insufficient for those charges to be included in the District Court's analysis. *E.E.O.C. v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1157, n2 (10th Cir. 2012) ("[T]he EEOC never submitted the other charges to the district court; rather, it provided summaries of those charges. Even if the other charges had any bearing on the relevance of the information sought by the EEOC, the district court could not have appropriately weighed the significance of those charges without having them in evidence.").

In early 2008, Ms. Ochoa filed an individual charge of discrimination (the "Ochoa Charge") against McLane Sunwest. [Ex. B, Stenson decl. ¶ 6.] In her charge of sex and disability discrimination, Ms. Ochoa alleges as follows:

> On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (physical capability strength test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007, and December 28, 2007, I retested and did not pass. I have worked for the above-named employer for over eight years as a cigarette selector.
>
> I believe I have been discriminated against because of my sex, female, (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> The physical capability strength test is given to all employees returning to work from medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended.

[Ex. B. Stenson decl. ¶ 7; Stenson decl. Ex. 1.][5]

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[5] A second investigation was initiated by the E.E.O.C. purportedly pursuant to its authority under the ADEA. ADEA Order, Apr. 4, 2012, dkt. 25, 2:11-12. To avoid duplicating the briefing in

Although Ms. Ochoa included reference to disability in her charge, she only asserted "pregnancy." E.E.O.C. and statutory authority make clear that pregnancy does not constitute a disability under the ADA. *See, e.g., Gabriel v. City of Chicago*, 9 F.Supp.2d 974, 980 (N.D. Ill. 1998) ("Consistent with the EEOC's Interpretive Guidance, many courts have held that pregnancy, absent abnormal or unusual circumstances, is not a disability.") (external citations omitted).[6]

C. The Response to Ms. Ochoa's Charge

McLane Sunwest denied Ms. Ochoa's allegations in their entirety and provided Investigator Rusden with evidence showing that Ms. Ochoa had not been discriminated against. [Ex. B, Stenson decl. ¶ 7.] Rather, all newly hired employees at McLane Sunwest, as well as all employees away from their jobs for more than 30 days, must take a physical capability evaluation ("PCE") designed and administered by Industrial

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the ADEA matter, McLane notes that the information regarding the ADEA investigation, documents produced and information provided to the E.E.O.C. as part of the ADEA investigation, and the improper intermingling of the ADEA investigation with Ms. Ochoa's charge is discussed in detail in McLane's Response to the E.E.O.C.'s Application for an Order to Show Cause Why Administrative Subpoena Should Not Be Enforced in the ADEA matter ("McLane's ADEA Response"). *See E.E.O.C. v. McLane Company, Inc.*, 2:12-cv-00615-GMS, dkt. 15.

[6] Additionally, E.E.O.C. Investigator Barbara Rusden confirmed during the interview of McLane Sunwest Human Resources Manager, Ms. Theresa Hatch, that the E.E.O.C. was not alleging that Ms. Ochoa's pregnancy was a disability protected by the ADA. [Ex. A, Stenson supp. decl. ¶ 7.]

Physical Capability Services, Inc. ("IPCS") to ensure they are qualified (have the strength capability) to safely perform the essential functions of any position identified as physically demanding by third-party ergonomic experts, General Management Solutions, Inc. [*Id.* at ¶ 7.] In fact, the IPCS PCE is completely objective as it is an isokinetic evaluation that is provided, analyzed, and validated by third parties, and the policy applies to all employees returning from leave in excess of 30 days regardless of the reason. [*Id.*]

McLane Sunwest cooperated with the E.E.O.C.'s investigation of Ms. Ochoa's charge, including submitting a position statement and responding to several additional requests for information and documents as well as subpoenas. [*Id.* at ¶ 8; Ex. B, Stenson decl. Exs. 3, 15, 34; Ex. A, Stenson supp. decl. Exs. 36-37, 40-45, 49.] McLane Sunwest also permitted the E.E.O.C. to conduct an on-site visit of its facility, and interview Theresa Hatch, McLane Sunwest's Human Resources Manager, on March 9, 2010, and Janann Williams, McLane's Vice President, People, on August 5, 2010. [Ex. B, Stenson decl. ¶8; Ex. A, Stenson, supp. decl. ¶ 7.]

To date, McLane has produced 89 exhibits, with numerous subparts, in response to Ms. Ochoa's charge and the E.E.O.C.'s requests. [Ex. A, Stenson supp. decl. ¶¶ 5-19.] Although Ms. Ochoa alleged only gender and disability discrimination relating to McLane Sunwest, a Grocery facility and separate corporate entity from McLane, the E.E.O.C. expanded its requests for information nationwide, seeking information for all of

McLane, including not only Grocery, but also Foodservice. [Ex. B, Stenson decl. ¶ 9.]

McLane already has produced an Excel database that included all individuals who have taken the IPCS PCE in any Grocery position nationwide through the date of the data collection. [Ex. A, Stenson supp. decl. ¶ 19; Stenson supp. decl. Ex. 49.] The database also included a unique employee ID number for each person who has taken the IPCS PCE, their location, gender, job class, test date, reason for taking the test, level achieved, whether they met the minimum requirements, and details regarding their IPCS scores. [*Id.; see also* Ex. A, Stenson supp. decl. Ex. 47.]

To produce the data requested by the E.E.O.C., McLane had to first request and obtain it from third-party IPCS. Not wanting to rely solely on third-party data, McLane has since undertaken extraordinary and time-consuming quality analysis to correct any IPCS data that conflicted with McLane's PeopleSoft data. [Ex. A, Stenson supp. decl. ¶¶ 18-20; Ex. A, Stenson supp. decl. Ex. 49.] After extensive analysis, McLane provided updated and corrected IPCS data to the E.E.O.C.[7] [*Id.*]

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[7] The inconsistencies with IPCS's data and the comparison with PeopleSoft data would have occurred irrespective of whether those taking the IPCS PCE were identified using social security numbers or otherwise. [Ex. A, Stenson supp. decl. Ex. 49.]

D. McLane's Additional Production in Response to the Court's April 4, 2012 Order in the ADEA Matter

The Court ruled in the ADEA matter that "Respondent must provide Petitioner with test results and any adverse employment actions taken against those who failed the test. It found that Respondent need not provide Petitioner with names, contact information, social security numbers, and other pedigree information (other than age) of those who took the test." ADEA Order, Aug. 9, 2012, dkt. 34, 1:27-2:3.

To be consistent with the Court's ruling, McLane voluntarily agreed to also produce similar data relating to Ms. Ochoa's charge—except with gender data in lieu of age. [Ex. A, Stenson supp. decl. Ex. 47.] Consistent with this Court's Order, McLane already provided updated and corrected data with IPCS scoring. McLane is in the process of identifying, gathering, and compiling information as to whether an adverse action occurred within 90 days of the IPCS PCE, and will be producing it to the E.E.O.C. as soon as the data set is complete. [Ex. A, Stenson supp. decl. ¶ 18.][8]

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[8] This analysis has turned out to be more complicated and time-consuming than originally anticipated. Programs were written to identify job changes in PeopleSoft. Individualized inquiries were necessary for certain IPCS PCE events because neither PeopleSoft nor any other computerized data set contained such information.

III. Legal Analysis

When reviewing the validity of an administrative subpoena, the Court conducts a three-part inquiry as to whether:

> (1) Congress has granted the authority to investigate; (2) procedural requirements have been followed; and (3) the evidence is relevant and material to the investigation.

Children's Hosp. Med. Ctr., 719 F.2d 1426, 1430 (9th Cir. 1983), *abrogated on other grounds by Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *as recognized by Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994).

"[T]he EEOC's investigative authority is tied to charges filed with the Commission; unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled access only to evidence 'relevant to the charge under investigation.'" *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 64 (1984); *EEOC v. Kronos, Inc.*, No. 09-3219, (D. Penn 2009). If this showing is made, the party being investigated bears the burden to show that the inquiry is unreasonable because it is overbroad or unduly burdensome. *EEOC v. Bashas Inc.*, No. CIV 09-0209-PHX-RCB, 2011 U.S. Dist. LEXIS 133447, at *28 (D. Ariz. Sept. 30, 2011).

McLane objects to the Subpoena as the E.E.O.C. is unable to meet the three-pronged test articulated in *Children's Hospital* and because the request is overly broad and unduly burdensome. Accordingly, McLane

requests that the Court deny the E.E.O.C.'s Application to enforce Subpoena PHX-11-32.

A. The Information and Documents Sought Are Not Relevant or Material to the Investigation and the Subpoena Exceeds the E.E.O.C.'s Statutory Authority[9]

While the E.E.O.C. has authority to subpoena evidence in an ADA and Title VII investigation, its authority is tied to the charge of discrimination. 29 U.S.C. § 161; 42 U.S.C. § 2000e-9; 42 U.S.C. § 12117(a); *E.E.O.C. v. Federal Exp. Corp.*, 558 F.3d 842, 849 (9th Cir. 2009). The concept of relevancy is viewed broadly, but the E.E.O.C.'s authority is not without constraints, as it must proceed with "a realistic expectation rather than an idle hope that something may be discovered." *E.E.O.C. v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002) (citation omitted) (explaining the relevance requirement is to "cabin the E.E.O.C.'s authority

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[9] In addition to exceeding its authority, the E.E.O.C. is employing tactics that are overreaching. As discussed in detail in McLane's ADEA Response, the E.E.O.C. has, among other things, contacted McLane Sunwest management employees without going through counsel, called a McLane Sunwest teammate in northern California and insisted that she provide the name and phone number of a friend who was a former teammate of McLane Sunwest, sent letters creating the impression that McLane has done something wrong and that the employee was obligated to cooperate with and immediately contact Investigator Rusden, and re-opened time-barred and/or previously resolved charges. [Ex. B, Stenson decl. ¶¶ 34-35; *see also* McLane Response, &ct. 15, 18:4-19:10.]

and prevent fishing expeditions."). "[T]he EEOC shall have access to any evidence that 'is relevant to the charge under investigation.'" *E.E.O.C. v. Quantum Foods, LLC*, 2010 U.S. Dist. LEXIS 41846, *7 (N.D. Ill. Apr. 26, 2010). This requirement reflects Congress' intent to prevent the E.E.O.C. from engaging in unrestrained fishing expeditions. *United Airlines*, 287 F.3d at 652-53.

The Court expressed concerns in the ADEA matter regarding the E.E.O.C. "trolling for possible complainants[.]"[10] ADEA Order, Apr. 4, 2012, dkt. 25, 9:3-5. Rather than attempt to assuage those concerns, the E.E.O.C. again seeks the very pedigree information that triggered the Court's concern in the first instance. The E.E.O.C. claims to be investigating "whether the IPCS test violates the ADA [or Title VII.]" Mem. in Support of Appl., dkt. 2, 8:16-18. Yet, despite many opportunities, the E.E.O.C. simply has not shown that obtaining the employees' and applicants' pedigree information relates to the adverse impact analysis of whether or not the IPCS PCE violates Title VII or the ADA.[11]

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[10] Investigator Rusden has also commented that the E.E.O.C. was not interested in engaging in discussions as to the ultimate issues, but rather was focused on finding "victims." [Ex. A, Stenson supp. decl. Ex. 39.]

[11] No one, not even the E.E.O.C., suggests that the IPCS PCE was applied discriminatorily, as opposed to neutrally. As such, disparate impact is the only relevant inquiry. *See Raytheon v. Hernandez*, 540 U.S. 44, 54 (2003) (holding that a neutrally applied policy is a "quintessential legitimate, nondiscriminatory

The E.E.O.C. claims it needs "information regarding disabilities of some individuals [because such disabilities] may not be readily apparent to Respondent." Mem. in Support of Appl., dkt. 2, 8:21-28. However, it belies logic to argue that McLane (or any of its subsidiaries) would have been required to provide an individualized accommodation or even engage in the interactive process with an individual who did not provide even minimal information to McLane regarding their alleged disabilities. *See, e.g., Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002) ("[O]nce an employee requests an accommodation or an employer recognizes the employee needs an accommodation but the employee cannot request it because of a disability, the employer must engage in an interactive process . . . "); *see also Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995) ("The ADA does not require clairvoyance.").

Additionally, each person taking the IPCS PCE is informed of the nature of the isokinetic assessment and asked to confirm that he/she has the physical capability to participate. In fact, each person who has taken the IPCS PCE attested as follows:

> *I have read and understand the above information and I understand that I will be asked to give maximum, all-out effort* ***within the limits of my ability****, and that I will be performing short periods of strenuous exercise. I*

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reason" to disparate treatment claims and distinguishing same from disparate impact claims).

*understand that I am not expected to work through discomfort that I can not tolerate. **

**To the best of my knowledge, I feel that I can complete all parts of the physical capability evaluation, so I do hereby authorize _____ to perform the tests described and consent to participate in the evaluations.*

[*See* Ex. A, Stenson supp. decl. Exs. 50 (emphasis in original), 51-52.] Thus, any person listed in the IPCS data attested to their physical capability to participate in the IPCS PCE.

Even under the less stringent standard of relevance under the ADEA,[12] the E.E.O.C. was not granted *carte blanche* authority to demand production of whatever it wanted. "The Court previously limited the scope of Petitioner's subpoena because Petitioners are investigating whether the PCE has an adverse impact on older test-takers, and the names, addresses, and social security numbers of test-takers is not related to a disparate impact investigation when '[t]he stated definition of the investigation does not suggest that the E.E.O.C. is investigating any acts of discrimination against particular individuals.'" ADEA Order, dkt. 34, 4:28-5:4. Likewise, Ms. Ochoa does not allege disparate treatment due to her alleged disability (pregnancy) or gender. Rather, she admits the IPCS PCE was required of all applicants and people returning from a leave of

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[12] The E.E.O.C. concedes the "relevance" standard of Title VII is more stringent than the "related to" standard of the ADEA. ADEA Order, dkt. 34, p. 5, n. 2.

absence in excess of thirty days. She complains only because she did not meet the minimum requirements, and was unable to return to work. [Ex. B, Stenson decl. Ex. 1.]

As the Court further noted, "[o]nce it has information concerning all persons who took the test and their ages when they took it, as well as their scores, the E.E.O.C. will have the information necessary to ascertain whether there is a correlation between age and test performance. But, even assuming there is such a correlation, the E.E.O.C. has no congressional authority, without more, to seek the names, contact information, or social security numbers of those people under the age of 40 who took the test. Respondent will not be required to provide contact information for people who have no standing to bring an ADEA claim. *See* 29 C.F.R. § 1625.2." ADEA Order, Apr. 4, 2012, dkt. 25, 5:8-15.

Even *if* the E.E.O.C. were permitted to obtain pedigree information in the ADEA matter—which it was not (other than age)—there is no reason why it would be entitled to receive information in the investigation of Ms. Ochoa's charge for individuals who do not even have standing pursuant to a charge based on her allegations—such as males, individuals without disabilities (such as Ms. Ochoa herself), or individuals who worked at separate and distinct corporate entities of McLane, as Ms. Ochoa only worked for McLane Sunwest, in the Grocery division.

B. The Information and Documents Sought Are Overbroad and Unduly Burdensome

McLane objects to certain portions of the Subpoena as overbroad and unduly burdensome. "[C]ompliance with a subpoena is excused if it 'threatens to unduly disrupt or seriously hinder normal operations of a business.'" *E.E.O.C. v. Bashas, Inc.*, No. CIV 09-0209-PHX-RCB, 2011 U.S. Dist. LEXIS 133447, at *35 (D. Ariz. Sept. 30, 2011) (quoting *E.E.O.C. v. Aaron Bros., Inc.*, 620 F. Supp. 2d 1102, 1106 (C.D. Cal. 2009)). Further, "[i]f the personnel or financial burden on the employer is great compared to the resources the employer has at its disposal, the district court should attempt to alleviate this burden." *E.E.O.C. v. Bashas, Inc.*, No. CIV 09-0209-PHX-RCB, 2011 U.S. Dist. LEXIS 133447, at *35 (D. Ariz. Sept. 30, 2011) (quoting *E.E.O.C. v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002)). "Essentially, this court's task is to weigh the likely relevance of the requested material to the investigation against the burden to [Respondent] of producing the material." *E.E.O.C. v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994).

With regard to its Grocery operations, McLane already has offered to produce the applicants' and employees': (i) sex; (ii) score on the test; (iii) position applied for or reason the test was taken; (iv) the requisite score required; and (v) whether the applicant or the employee suffered an adverse employment action

within 90 days.[13] Accordingly, the following analysis focuses on the *remaining* information the E.E.O.C. is requesting:

> (1) the names, last known addresses, phone numbers and social security numbers of the employees and applicants who suffered an adverse employment action because they did not meet the minimum qualifications for the IPCS PCE (PHX-11-32, Request Nos. 10, 11a, 14, and 15); and
>
> (2) the following data for all employees and applicants who took the IPCS PCE:
>
> > a) name, b) social security number, c) last known home address and telephone number, . . . e) medical condition, f) date of application, g) date of hire (or promotion), and job classification at hire (or promotion), . . . and l) date and reason for termination (if applicable) (PHX-11-32, Request Nos. 8(a)-(l)).

See Mem. in Support of Appl., dkt. 2, 4:14-5:6 (abbreviated to identify items in dispute). For the reasons discussed below, the aforementioned request is overly broad, and the production of such information would be unduly burdensome.

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[13] In fact, McLane already produced all of this information, with the sole exception that, despite diligent efforts, it is still completing the analysis of adverse employment actions.

i. The E.E.O.C. Has Conveyed No Basis for Expanding Its Investigation

The E.E.O.C. notified McLane Sunwest on November 9, 2010 that "the Commission has made a decision to broaden the scope of its investigation for the above-referenced charge to all McLane facilities/locations nationwide." [Ex. B., Stenson decl. Ex. 10.] The E.E.O.C. offered no justification whatsoever for expanding the investigation from Ms. Ochoa's employer, to the entire McLane Grocery division, then to McLane's Foodservice division, and then to all McLane corporate.

In *E.E.O.C. v. Burlington Northern Santa Fe Railroad*, the Tenth Circuit affirmed the underlying district court's refusal to enforce an administrative subpoena and explained that the E.E.O.C.'s statement that it was broadening its investigation conveyed no basis for expanding the investigation. 669 F.3d 1154 (10th Cir. 2012); *see also E.E.O.C. v. Packard Electric Div.*, 569 F.2d 315, 316-18 (5th Cir. 1978) (holding the district court did not err in limiting the E.E.O.C.'s subpoenas to tailor disclosure to the character of the particular charges made rather than allowing the E.E.O.C. to obtain "broad statistical information as to the respective employers' entire work force"). While McLane's Grocery division and Foodservice both use the IPCS PCE, the decision to use the PCE was made separately from each other, the implementation dates differ, and even the underlying Job Task Analyses differ. [Ex. A, Stenson supp. decl. ¶ 21.] Moreover, Ms. Ochoa never worked for Foodservice (Ex. A, Stenson

supp. decl. ¶ 21), and the additional information requested is irrelevant to her charge.

ii. The Demand for Information Has Been Made for an Illegitimate Purpose

McLane fully briefed this argument in the ADEA Matter, explaining the E.E.O.C.'s barrage of requests through its intertwined investigations. *Supra*, n. 4. For brevity, McLane will not further address this argument here, but incorporates it by this reference.

iii. The Cost of Gathering the Information is Unduly Burdensome in Light of the Company's Normal Operating Costs and Would Threaten Normal Business Operations

"A Court may decline to enforce a valid subpoena if the request is unduly burdensome." *Quantum*, 2010 U.S. Dist. LEXIS 41846 at *15 (explaining that a subpoena is excessively burdensome if it threatens the normal operation of the business); *see also E.E.O.C. v. United Air Lines*, 287 F.3d 643, 655 (7th Cir. 2002). "What is unduly burdensome depends on the particular facts of each case and no hard and fast rule can be applied to resolve the question." *United Air Lines*, 287 F.3d at 653 (citation omitted).

Certain items requested in the Subpoena would require manual person-by-person analysis and data compilation on thousands of current and former employees and applicants nationwide, significantly

disrupting McLane's business operations. IPCS (the third-party vendor) maintains a database relating to individuals who have taken the IPCS PCE in relation to positions in McLane or its affiliated companies. To facilitate the E.E.O.C.'s analysis, McLane obtained information from IPCS relating to all Grocery operations and produced the same—albeit with no names and social security numbers. At the time McLane initially obtained the data, it reflected 12,091 individuals having taken the IPCS PCE in relation to Grocery operations alone. As of January 20, 2012, IPCS data showed 13,883 individuals having taken the IPCS PCE in relation to Grocery operations. [Ex. E, Perlioni decl. ¶ 5.] Likewise, as reflected in the production on September 5, 2012, which is current through March 2012, the spreadsheet shows 15,941 instances the IPCS PCE has been taken in relation to Grocery operations, with 14,004 individuals having taken the IPCS PCE. [Ex. A, Stenson supp. decl. ¶ 20.]

(a) The IPCS database does not show the last known address or phone number

The IPCS database has only limited information, requiring McLane to locate records from across its various facilities, from various people and files, and/or in PeopleSoft. The E.E.O.C. seeks the last known address and phone number for every person who has taken the IPCS PCE, regardless of whether they did or did not meet the minimum requirements for the position they

sought—in other words, for the entire universe of now, 14,004 individuals. [*Id.*][14]

Contact information for every person taking the IPCS PCE regardless of result is unnecessary to any legitimate disparate impact investigation. Under the circumstances, such information is also unduly burdensome. The IPCS database of individuals who have taken the PCE does not include last known address or phone number. [Ex. D, Worsham decl. ¶ 7.] McLane would have to research each individual name or social security number in its PeopleSoft database for information as to current and former employees (not applicants). [*Id.* at ¶ 8.]

Moreover, for applicants who were never hired and, thus, not in PeopleSoft, more time consuming research would be necessary. The IPCS data reveals 13,498 IPCS PCE were administered for *new hire* testing for Grocery operations. [Ex. A, Stenson supp. decl. ¶ 20.] Of those, 2,239 individuals did not achieve the minimum requirements to safely perform the essential functions of the position they sought. [*Id.*] Assuming that none of the 2,239 individuals were hired, no PeopleSoft data would be available, including no contact information. [*Id.*] Last known addresses and phone numbers of applicants would not be available on any log or in any database. [Ex. F, Sill decl. ¶ 14; Ex. E, Perlioni decl. ¶ 7.] To obtain last known addresses and

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[14] McLane's concerns regarding the disclosure of confidential information were briefed in its ADEA Response and, therefore, are not repeated here. *See* McLane's ADEA Response, 29:8-25.

phone numbers would require a manual search of hard copy or outlook files, assuming the applications and resumes still exist—which is unlikely going back to 2006 as requested by the E.E.O.C. [Ex. F, Sill decl. ¶¶ 14, 16.]

Considering all of the variables, locating last known addresses for applicants who *were never hired*, to the extent they still exist, would take 30 minutes per person on average. [*Id.* at ¶ 16.] Assuming 2,239 such candidates, using the average of 30 minutes per candidate, this would require 67,170 minutes/1,119.5 hours to complete, building in no extra time to account for anomalies and the more time intensive search necessary for the more dated applications. For the most part, this search would have to be done at the local facility site and would be very disruptive to the operations. [*Id.*] McLane simply does not have the manpower to undertake this compilation—particularly in a short timeframe—as it would seriously disrupt its operations.

(b) The IPCS database does not show "date of application"

The E.E.O.C. seeks the "date of application" for every person who has taken the IPCS PCE, regardless of whether they met the minimum requirements for the position they sought. It is unclear why the date of application is even relevant to any legitimate analysis the E.E.O.C. would undertake. Date of application is

not in the IPCS database and is not maintained in PeopleSoft. [Ex. D, Worsham decl. ¶ 9; Ex. E, Perlioni decl. ¶ 7.] It would require a manual examination of individual employee hard copy files and applicant data to determine the date each of the 14,004 individuals taking the IPCS PCE signed and submitted their application to McLane. [Ex. D, Worsham decl. ¶ 9; Ex. A, Stenson supp. decl. ¶ 20.] This would be an incredible burden that is simply too onerous and would be difficult, if not impossible, to estimate.

(c) The IPCS database does not show the date of hire (or promotion)

Similar to the discussion regarding the "date of application" above, McLane would have to research this information in PeopleSoft by the social security numbers from the IPCS database. [Ex. D, Worsham decl. ¶ 8; Ex. E, Perlioni decl. ¶ 7.] Ms. Worsham believes that dates of hire could be captured by the PeopleSoft query. [Ex. D, Worsham decl. ¶ 8.] However, it would be almost impossible to use a query in PeopleSoft to generate a report of dates of "promotion" for all of those employees listed on the IPCS spreadsheet. [Ex. D, Worsham decl. ¶ 9.] There are so many variables in the job codes reflecting changes to job status, it would require an unduly burdensome manual analysis of every job change to determine if the change reflected an actual promotion, and there would be numerous job code changes for every individual in the system. [Ex. D, Worsham decl. ¶ 9.] This also would be an incredible

burden that is simply too onerous and, again, would be difficult to estimate.

(d) The IPCS database does not show job classification at hire

Similar to the discussion above, McLane would have to research this information in PeopleSoft by the social security numbers in the IPCS database. [Ex. D, Worsham decl. ¶ 8; Ex. E, Perlioni decl. ¶ 7.]

(e) The IPCS database does not show date and reason of termination

The E.E.O.C. seeks the reason for termination for every person who has taken the IPCS PCE, regardless of whether they met the minimum requirements for the position they sought and regardless of whether the termination had anything to do with the person's level of achievement on the IPCS PCE. However, such information is not included in the IPCS database. [Ex. E, Perlioni decl. ¶ 7.]

As the E.E.O.C.'s request is written, if an employee achieved the level of physical capability required to perform the essential functions of the position sought and was hired, but later fired for stealing, McLane would be required to disclose the "reason for termination" despite the fact such reason is entirely irrelevant to the E.E.O.C.'s investigation. Moreover, the E.E.O.C. also requests the name and job titles for the individuals responsible for hiring, promoting, and/or terminating every person who has taken the

IPCS PCE. Not only is this information far from relevant, it would require a manual analysis of every person among the 15,941 who is no longer employed to identify the decision-maker—likely having nothing to do with the IPCS PCE.

(f) The IPCS database does not identify medical conditions, and its request is vague, overbroad, and unduly burdensome

The E.E.O.C. seeks information relating to the vague concept of "medical conditions." However, Ms. Ochoa's charge does not (1) allege disparate treatment under the ADA or, in particular, a failure to accommodate, which is inherently an individualized inquiry, or (2) identify a qualified disability. The E.E.O.C. also has not articulated a reason as to why it needs this information for its analysis. Rather, the E.E.O.C. is, again, "trolling" for purported victims, under the guise of a disparate impact case, even though it has never identified any particular disability or medical condition within the scope of its investigation. Further, an inquiry about medical conditions is not relevant to a disparate impact analysis.

McLane does not track medical conditions or maintain such a database. It is impossible to locate information regarding applicants' medical conditions, if any. To the extent any information regarding employees' medical conditions is even available, it would require a page-by-page review and analysis of the

confidential files of thousands of employees. This request is unlimited and seeks information spanning from the common cold to cancer. This would result in a substantial burden to Company resources. It would be difficult, if not impossible, to estimate the number of personnel hours needed to complete this amorphous analysis and compilation of data at each of the various Grocery locations. [Ex. A, Stenson supp. decl. ¶ 23.]

C. The E.E.O.C. is Not Entitled to Pedigree Information

The E.E.O.C. refers to the decisions in *State of Arizona ex rel. v. GEO Group, Inc.* and *E.E.O.C. v. CRST Van Expedited, Inc.*, for the proposition that the E.E.O.C. may be required to identify putative class members during its investigation. *See* Mem. in Support of Appl., dkt. 2, 9:22-10:10. However, nothing in those cases suggests that this requirement somehow alters the relevancy requirements, or would require McLane to provide the E.E.O.C. with pedigree information at this juncture and in this disparate impact investigation.

Geo Group is a disparate treatment case in which the charging party alleged she was sexually harassed and retaliated against for reporting the incident. *See* Mem. in Support of Appl., Ex. B (copy of unpublished opinion) at p. 2. Likewise, *CRST* is also a disparate treatment case alleging that female employees were subjected to a hostile work environment. 679 F.3d 657,

682-83 (8th Cir. 2012). Ms. Ochoa alleged disparate impact discrimination based on the use of the IPCS PCE, and there is simply no need for any additional information for the E.E.O.C. to conduct its analysis.

IV. Conclusion

The E.E.O.C. continues to barrage McLane with burdensome, overbroad and irrelevant requests relating to the IPCS PCE. Significantly, the E.E.O.C. has not demonstrated why the requested information is relevant to its investigation, or why McLane should suffer the serious disruption to its business to produce the remaining requested information. Accordingly, McLane respectfully requests that the E.E.O.C.'s Application be denied.

DATED this 26th day of September, 2012.

SNELL & WILMER L.L.P

By: s/ Ashley Kasarjian
Joshua R. Woodard
Ashley Kasarjian
One Arizona Center
400 East Van Buren
Phoenix, Arizona 85004-2202

[Certificate of Service Omitted]

[Doc. 9-1]

EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, v. McLane Company, Inc. Respondent.	Case No. 2:12-mc-00081-GMS **DECLARATION OF SUZANNE H. STENSON IN SUPPORT OF RESPONDENT MCLANE COMPANY, INC.'S RESPONSE TO PETITIONER'S APPLICATION FOR AN ORDER TO SHOW CAUSE WHY AN ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

1. I, SUZANNE H. STENSON, declare as follows:

2. I have personal knowledge of the facts and matters set forth in this declaration and could and would testify competently and truthfully to the same if called as a witness and placed under oath. I am over 18 years of age.

3. I make this declaration in support of Respondent McLane Company, Inc.'s ("McLane") Response to Petitioner's Application for an Order to Show Cause Why An Administrative Subpoena Should Not Be Enforced, in the case styled *E.E.O.C. v. McLane Company, Inc.*, Case No. 2:12-mc-00081-GMS (the "Title VII Matter").

4. This declaration is intended to supplement my declaration executed and filed on February 17, 2012, in the matter *E.E.O.C. v. McLane Company, Inc.*, Case No. 2:12-mc-00007-GMS/2:12-cv-00615-GMS (hereinafter referred to as the "ADEA Matter", with the corresponding declaration referred to as the "ADEA Declaration"), and to provide specific information related to the Title VII Matter.

5. McLane/Suneast, Inc. (d/b/a and hereinafter referred to as "McLane Sunwest"), filed its position statement in response to Ms. Damiana Ochoa's charge of sex and disability discrimination (ADEA Declaration, Ex. 1) on April 25, 2008 and produced exhibits 1-24 to support its response. A true and correct copy of the response is attached as **Exhibit 36**.

6. A supplemental response addressing the E.E.O.C.'s requests for information and documents, and producing exhibits 25-64 was sent on November 13, 2009 (ADEA Declaration, Ex. 3).

7. McLane Sunwest permitted representatives of the E.E.O.C. to conduct an on-site visit of its facility, and agreed to the interview of Theresa Hatch, McLane Sunwest's Human Resources Manager, on March 9, 2010, and an interview of Janann Williams, McLane's Vice President, People, on August 5, 2010. Upon information and belief, when asked during the interview of Ms. Hatch whether the E.E.O.C. was alleging that pregnancy was a disability protected by the ADA or whether the E.E.O.C. was pursuing a pregnancy disability claim under the ADA, the E.E.O.C. responded that it was not.

8. The E.E.O.C. notified McLane Sunwest that it "made a decision to broaden the scope of its investigation for the above-referenced charge to all McLane facilities/locations nationwide" on November 9, 2010. (ADEA Declaration, Ex. 8).

9. McLane Sunwest provided additional information on January 14, 2011, and produced exhibits 65A-75. A true and correct copy of the response is attached as **Exhibit 37**.

10. In response to Subpoena No. PHX-11-32, dated February 15, 2011 (ADEA Declaration, Ex. 14), which included the expanded scope, and requested information from all of McLane Company, Inc.'s facilities

and locations nationwide, Respondents McLane Sunwest and McLane Company, Inc. jointly filed a Petition to Revoke on February 22, 2011 (ADEA Declaration, Ex. 15).

11. On March 25, 2011, the E.E.O.C. issued a second subpoena (No. PHX-11-42) relating to Ms. Ochoa's Charge. (ADEA Declaration, Ex. 19). McLane and McLane Sunwest jointly filed a Petition to Revoke on April 1, 2011. A true and correct copy of the Petition to Revoke is attached as **Exhibit 38**. A true and correct copy of correspondence regarding the parties' forthcoming meeting, sent to the E.E.O.C. on August 19, 2011, is attached as **Exhibit 39**.

12. McLane Sunwest provided additional information to the E.E.O.C. on December 6, 2011, and produced exhibit 76. A true and correct copy of that correspondence is attached as **Exhibit 40**.

13. On December 22, 2011, additional information and exhibits 77-83 were produced. A true and correct copy of that correspondence is attached as **Exhibit 41**.

14. On February 6, 2012, the E.E.O.C. issued a third subpoena (No. PHX 12-20) relating to its investigation into Ms. Ochoa's Charge. (ADEA Declaration, Ex. 32). McLane Sunwest filed its Petition to Revoke on February 13, 2012. (ADEA Declaration, Ex. 34).

15. On February 22, 2012, additional information and exhibits 84-86 were produced. A true and

correct copy of that correspondence is attached as **Exhibit 42**.

16. On March 2, 2012 and March 6, 2012, additional videos were sent as part of a supplemental response to exhibit 84. True and correct copies of the related correspondence are attached as **Exhibit 43** and **Exhibit 44**, respectively. Additionally, a supplement to an exhibit produced previously in PDF format was produced on April 30, 2012, in Excel format as exhibit 87. A true and correct copy of that correspondence is attached as **Exhibit 45**.

17. The E.E.O.C. issued its Final Determination on Petition to Revoke or Modify Subpoenas ("Final Determination"), denying the Petition to Revoke Subpoena No. 11-32 on March 21, 2012. A true and correct copy of the Final Determination is attached as **Exhibit 46**.

18. McLane Sunwest responded to the Final Determination on April 10, 2012. It noted that the E.E.O.C. references only subpoena requests 8(a)-(1), 10, 11(a), 14 and 15, and addressed its response only to those requests. McLane Sunwest recognized that, by implication, the E.E.O.C. granted the remaining requests, including requests 1, 2, 3, 4, 5, 6, 7, 8(m), 9, 11(b), 12, 13, 16, 17, and 18. As a result of the Court's Order in the ADEA Matter, McLane Sunwest further agreed to voluntarily provide the information the Court ordered to be produced, with gender information offered in lieu of age. On that same date, McLane Sunwest also produced exhibit 88. A true and correct copy

of the response is attached as **Exhibit 47**. McLane has produced all information required in the ADEA order, with the exception of information as to adverse employment actions within 90 days. McLane is in the process of identifying, gathering, and compiling this information and will be producing it to the E.E.O.C. as soon as the data set is complete. Despite diligent efforts, this undertaking has taken much more time than originally anticipated.

19. As acknowledged in its May 10, 2012 correspondence (a true and correct copy is attached as **Exhibit 48**), errors appeared to have been made by IPCS in their de-duplication of data collected from IPCS; therefore, a new set of quality-checked data, without de-duplication, was produced as exhibit 89 on September 5, 2012. A true and correct copy of that correspondence is attached as **Exhibit 49**.

20. As reflected in the production on September 5, 2012, the spreadsheet shows: 15,941 instances the IPCS PCE has been taken in relation to Grocery operations; 14,004 employees or applicants took the IPCS PCE; 13,498 IPCS PCE were administered for new hire testing for Grocery operations and, of those, 2,239 individuals did not achieve the minimum requirements to safely perform the essential functions of the position they sought; and 2,443 individuals took the IPCS PCE for reasons other than "new hire," such as job transfer or return to work.

21. While the Grocery division and Foodservice both use the IPCS PCE, the decision to use the PCE

was made separately from each other, the implementation dates differ, and my understanding is that even the underlying Job Task Analyses differ. Ms. Ochoa never worked for Foodservice.

22. It is my understanding from IPCS that certain forms are required to be completed by every individual prior to taking the IPCS PCE. To my knowledge, the individuals who have taken the IPCS PCE completed these forms and, thereby, designated themselves as being capable of taking the IPCS PCE. A true and correct copy of the Authorization and Consent Form is attached as **Exhibit 50**, the Memorandum of Understanding is attached as **Exhibit 51**, and the IPCS Guidelines are attached as **Exhibit 52**

23. The E.E.O.C. has requested information regarding every employees' and applicants' "medical condition," McLane does not track medical conditions, if any, or maintain a database of such information. My understanding is that it is impossible to locate information regarding the applicants' medical conditions, if any. To the extent any information regarding employees' medical conditions is even available, it would require a page-by-page review and analysis of the confidential files of the thousands of employees who took the IPCS PCE. Further, because the E.E.O.C. has never identified a type of disability or medical condition within the scope of its purported investigation, the potential analysis is unlimited and seeks information spanning from the common cold to cancer. This would result in a substantial burden to Company resources. It would be difficult, if not impossible, to estimate the

number of personnel hours needed to complete this analysis and compilation of data at each of the various Grocery locations.

24. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED on September 26, 2012 at Temple, Texas.

/s/ Suzanne H. Stenson
SUZANNE H. STENSON

[Doc. 9-1]

EXHIBIT 37

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January 14, 2011

VIA HAND-DELIVERY

Barbara Rusden, Investigator
Equal Employment Opportunity Commission
Phoenix District Office
3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012

Re: *Charge No.:* *548-2008-01093*
Charging Party: *Damiana Ochoa*
Respondent: *McLane Sunwest, Inc.*

Dear Ms. Rusden:

As previously advised, this law firm represents the Respondent, McLane Sunwest, Inc. (hereinafter referred to as "McLane Sunwest" or the "Company") in the above-referenced matter. This letter is in response to your request for information dated November 9, 2010.

As a preliminary matter, the Company objects to the expansion of the investigation outside the scope of the underlying Charge into a division of the Company which Charging Party was not even employed. As referenced in our email correspondence dated September 21, 2010, December 20, 2010, and January 14, 2011, the Company believes that an investigation into all McLane locations is overly broad, unduly burdensome, and seeks information that is not relevant to the underlying Charge of Discrimination.

The employees in the food division are not similarly situated to the employees in the grocery division. In addition to the fact that the separate McLane facilities are independent centers, the food service division

and grocery division are entirely distinct companies operationally. Ms. Janann Williams explained during her August 5, 2010 interview that the decision to use the IPCS test in the grocery division was made independently of the decision to use the IPCS test in the food service division. Ms. Williams further noted that each division had its own Job Task Analyses prepared. Accordingly, the prior actions of the food service division are not the subject of or related to Ms. Ochoa's Charge. Ms. Ochoa was never employed in a food service distribution center, and none of her allegations relate to the food service distribution centers. The EEOC's newly expanded request—now seeking information and documentation from distinct companies, distinct operations, and distinct divisions of McLane Company, Inc.—cannot fairly or accurately be argued to have arisen from the EEOC's investigation of Ms. Ochoa's Charge.

Moreover, many of the requests below are objectionable for several reasons, including that they: (1) require the Company to produce or create information, electronic or otherwise, in a medium or format other than that in which it is maintained in the normal course of business, and therefore are unduly burdensome; (2) require production and indexing of extensive electronically stored information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information;

(3) seek information and/or documents that are not relevant to the Charge under investigation or any aspect of any Charging Party's current or former employment with the Company and/or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related thereto the allegations in the Charge;[1] (4) seek information concerning employment policies, practices, or decisions other than those at issue in the Charge, and therefore are not reasonably calculated to lead to the discovery of admissible evidence; (5) are not properly limited in time and seek documents beyond any statute of limitations applicable to the Charge, and therefore are not reasonably calculated to lead to the discovery of admissible evidence; (6) require the Company to provide information and/or documents about employees nationwide at independent facilities owned

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[1] "The scope of the judicial inquiry in an EEOC or any other agency subpoena enforcement proceeding is quite narrow. The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." *E.E.O.C. v. Fed. Express Corp.*, 558 F.3d 842, 848 (9th Cir. 2009). The EEOC is only entitled to inspect and copy evidence that is relevant to the charge under investigation. *Id.* at 849 (citing *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 63 (1984) (quoting 42 U.S.C. § 2000e-8(a)); *see also University of Penn. v. E.E.O.C.*, 493 U.S. 182, 194 (1990) ("[U]nless specifically provided otherwise in the statute, the EEOC may obtain 'relevant' evidence."). "[T]he EEOC's investigative authority is tied to charges filed with the Commission; unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled access only to evidence 'relevant to the charge under investigation.'" *Shell Oil*, 466 U.S, at 64.

and/or operated by McLane Company; (7) require documents to be provided that are not within the possession, custody or control of McLane Sunwest or any other facilities in the grocery division of McLane Company; and (8) require the Company to provide information and/or documents, including proprietary and confidential information, concerning McLane Sunwest's and/or McLane Company's employees, policies, practices, or decisions other than those at issue in the Charge.

As you are aware, the Company has cooperated with the EEOC and its investigation of Ms. Ochoa's Charge, and is willing to continue complying with the agency's requests for information, to the extent they are reasonable and permissible. In response to Ms. Ochoa's Charge, McLane Sunwest submitted a position statement with 24 supporting exhibits on April 25, 2008. In response to the EEOC's first Request for Information ("First RFI"), McLane Sunwest submitted a supplemental response and supporting exhibits 25-64 on November 13, 2009. McLane Sunwest also permitted the EEOC to conduct an on-site visit of the McLane Sunwest facility, and agreed to the interview of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010.

However, the current request triggers the same concerns the Company previously raised regarding the August 6, 2010 request for information ("Second RFI"), which requested information regarding McLane Sunwest and McLane Company. As discussed in the

Company's response on September 3, 2010, the Company is concerned with the intermingling and timing of the requests for information in Ms. Ochoa's matter and the new Commissioner's Charge regarding the Age Discrimination in Employment Act, in addition to their burdensome nature. *See, e.g., EEOC v. Bashas*, 2009 WL 3241763 (D. Ariz. Sept. 30, 2009). Of significance, the expansive requests for information were nearly identical (even after their revision), and were even initially identified as if the Charges were one-and-the-same, despite Ms. Ochoa not being over 40 years old at the time of her employment. While the request for age-related data was removed, the EEOC has continued to assert that it is expanding the scope of its investigation of Ms. Ochoa's Charge nationwide, despite the fact that the Company is comprised of operationally-distinct divisions.

The Company continues to be willing to respond to any reasonable requests for information and to assist in any manner that is appropriately responsive to the EEOC's specific investigative needs, while still being cognizant of the Company's legitimate concerns. To this end, the responses to the current requests for information are provided below in bold. The Company hereby incorporates all of the above objections into each of the following responses.

REQUEST NO. 1:

Submit the name, title, address and telephone number of the person to whom further inquiries regarding this charge should be directed.

RESPONSE TO REQUEST NO. 1:

Please continue to direct all correspondence relating to Ms. Ochoa's charge to Josh Woodard and Ashley Kasarjian, as follows:

Josh Woodard
Ashley Kasarjian
Snell & Wilmer, L.L.P
400 East Van Buren
Phoenix, Arizona 85004
Phone: (602) 382-6281 (Woodard);
(602) 382-6544 (Kasarjian)

REQUEST NO. 2:

Provide the correct legal name and business address of the Respondent named in the charge and describe the nature of Respondent's business. Include any and all trade names, d/b/a's, or former names. Also include documentation either already in existence or prepared by Respondent in response to this request that describes or provides the following information:

McLane/Suneast, Inc. (aka McLane Sunwest)
14149 W. McDowell Road
Goodyear, AZ 85395

a. the type of corporate or business entity

Corporation

b. approximate number of employees during calendar years 2007 and 2008

McLane Sunwest had 511 employees as of January 1, 2007, and 497 employees as of January 1, 2008.

c. location of corporate headquarters

McLane/Suneast, Inc. (aka McLane Sunwest)
14149 W. McDowell Road
Goodyear, AZ 85395

d. current status of the corporation, i.e. active, inactive, or another status

Active

e. the name of Respondent's corporate officers, directors, and owners

The Company objects to the information request regarding the Company's corporate officers, directors and owners on the grounds that it seeks information that is not relevant to the Charge under investigation or any aspect of any Charging Party's current or former employment with the company, and therefore is not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related to the allegations in the Charge filed with the EEOC.

f. the statutory agent for Respondent in Arizona

CT Corporation

g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

i. Provide the legal name and business address of all superior and subordinate business entities identified.

ii. Provide the statutory agent for all supervisor and subordinate business entities identified.

Respondent is owned by McLane Company, Inc. The address for McLane Company, Inc. is P.O. Box 6115, Temple, Texas, 76503. Its statutory agent is CT Corporation.

RESPONSE TO REQUEST NO. 2:

Please see the responses listed above in bold.

REQUEST NO. 3:

Does the Respondent have a policy of liability insurance that will provide coverage for the claims asserted in this charge? If so, please provide a copy of the policy.

RESPONSE TO REQUEST NO. 3:

The Company objects to the request for information related to the policies regarding liability insurance on the grounds that it seeks

information and/or documents that are not relevant to the Charge under investigation or any aspect of any Charging Party's current or former employment with the company, and therefore is not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related to the allegations in the Charge filed with the EEOC.

REQUEST NO. 4:

Submit a copy of any employee handbook in effect during the relevant time period and

a. explain in detail how this information is disseminated to employees, and

b. provide the date when any employee handbook went into effect, and the dates of any revisions.

RESPONSE TO REQUEST NO. 4:

The EEOC identified the "relevant time period" as January 1, 2006 to the present. Notably, an alleged discriminatory practice that is not made the subject of a timely charge of discrimination with the EEOC may not later be challenged in court. *See, e.g., EEOC v. Freeman*, 2010 U.S. Dist. LEXIS 41336 (D. Md. Apr. 26, 2010). Accordingly, the Company objects to the requests to beyond the extent that they are beyond the statute of limitations applicable to Ms. Ochoa's Charge. Without waiving this objection, the Company provides the documents identified

within this response. The Company further objects to this request to the extent that policies and procedures are requested that are unrelated to the policies applicable to Ms. Ochoa's Charge. Without waiving this objection, the following provisions of the Employee Handbook from the grocery divisions are attached:

Exhibit	Date	y/Provi
65(A)	July 2005	Equal Employment Opportunity
65(B)	September 2008	
65(C)	January 2010	
65(D)	February 2010	
65(E)	September 2010	
66(A)	July 2005	Harassment/Sexual Harassment/ Investigating and Resolving Complaints
66(B)	September 2008	
66(C)	January 2010	
66(D)	February 2010	
66(E)	September 2010	
67(A)	July 2005	Safety
67(B)	September 2008	
67(C)	January 2010	
67(D)	February 2010	
67(E)	September 2010	
68(A)	July 2005	Leave of Absence
68(B)	September 2008–	
68(C)	February 2009	
69(D)	January 2010	
69(E)	February 2010	
68(F)	September 2010	

69(A)	**July 2005**	**Communication and Conduct**
69(B)	**September 2008**	
69(C)	**July 2009**	
69(D)	**January 2010**	
69(E)	**February 2010**	
69(F)	**September 2010**	

Responding to subsection a, the Employee Handbooks are provided to employees upon hire and also following any substantial revisions. Employees receive notification of all minor revisions to individual policies, and the Handbooks are always available on the Company's internal network, eSERVE.

Responding to subsection b, the date that any provision went into effect is listed on the chart above and/or on the policy or Handbook itself.

REQUEST NO. 5:

List each test used by respondent during the relevant time period, including but not limited to Industrial Physical capability Strength test (IPCS) and Isokinetic Physical Capability test (IPCT), and list any variations of each test in use.

a. For each test variation listed, identify all jobs or job classifications for which it has been used.

RESPONSE TO REQUEST NO. 5:

The Company objects to this request as it seeks information concerning employment policies, practices, or decisions other than those at issue in the Charge, and therefore is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, the request seeks documents beyond any statute of limitations applicable to the Charge.

REQUEST NO. 6:

For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #5 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:

a. describe how the test was developed and how it is used by Respondent,

b. provide the name of each test's or variation's author or creator, the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

c. describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the process. Include all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of respondent's locations. Include any

and all documents reviewed by any key decision makers in addition to paragraph 7 below,

d. specify the effective dates of use of each test or variation at each of Respondent's locations,

e. provide any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for individual(s) who administer the test and individual(s) who take the test,

f. provide a description of how each test or variation is administered and scored. Include a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s),

g. provide a list of all jobs and job classifications for which any test or variation is used,

h. for each job or job classification for which a test or variation is used, identify the specific test or variation (listed in response to paragraph 5) used for that job or job classification,

i. for each job or job classification for which a test or variation is used, identify the score(s) that are considered "passing" and failing," or any other rating classification used, provide details on the process by which any scoring/classification system was established, and provide details about the process by which Respondent determined the minimum score considered "passing."

j. for each job or job classification for which a test or variation is used, provide job descriptions,

k. provide copies of any and all adverse impact studies performed for each test or variation.

RESPONSE TO REQUEST NO. 6:

Please refer to the response to request number five. Further, the Company objects to this request as it is unduly burdensome and would require each company and/or division of McLane Company to produce and/or create extensive information and documentation including but not limited to the use, development, origination, implementation, scoring, and administration of tests at each facility. The Company has produced detailed information regarding the IPCS test in its position statement, dated April 25, 2008 and the response to the First RFI, dated November 13, 2009, as well as at the interviews of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010.

REQUEST NO. 7:

Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #5 and #6 above, to include any notes or other documents concerning development and implementation of the test by Respondent.

RESPONSE TO REQUEST NO. 7:

The Company has produced the validation study provided by Vedder Price P.C., dated January 14, 2005, as Exhibit 15 to the position statement submitted on April 25, 2008. Additionally, the Company produced the validation studies provided by Vedder Price P.C., dated April 21, 2008 and August 23, 2002, as Exhibits 30 and 31 to the First RFI, dated November 13, 2009.

REQUEST NO. 8:

For all positions at Respondent's facilities/ locations nationwide for which any test or variation identified in #5and #6 above is used, provide the Job Task Analysis for each position. Include:

a. a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and

b. any documents containing job analysis information for all positions wherein testing is applied to employees and/or new hires.

RESPONSE TO REQUEST NO. 8:

The Company has produced the Job Task Analyses ("JTAs"), as Exhibits 41-54 to the First RFI, dated November 19, 2009. Additionally, the following JTAs from the grocery divisions of McLane Company, Inc. are enclosed with this response.

Exhibit	Job Task Analysis
70	Checker (4/14/10)
71	Forklift Dock Hauler (3/30/10)
72	Full Case Loader (8/16/06)
73	Heavy Selector (4/13/10)
74	Light Selector (4/13/10)
75	Team Lead (4/13/10)

REQUEST NO. 9:

For the relevant time period, provide documents or a listing[2] of information identifying all persons who took any test or variation identified in #5 and #6 in connection with employment at any of Respondent's locations or facilities nationwide. Provide a separate list for each facility/location nationwide and annotate the list by:

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[2] The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

g. date of hire (or promotion), and job classification at hire (or promotion)

h. test date, test score (overall test score and any and all sub-test scores) name of test administered, test result (pass, fail, or other classification)

i. position held at the time test was administered (for individuals employed at the time or returning to work)

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

RESPONSE TO REQUEST NO. 9:

The Company objects to this request as it would require the Company to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to the Charge under investigation, the validity of the IPCS test, or any aspect of any Charging Party's current or former employment with the company, and therefore are not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related thereto the allegations in the Charge. The information requested relates to thousands of employees and is not actively tracked and/or maintained by the Company. It would be unduly burdensome for the Company to produce the requested information as it would require the Company to categorize, classify and identify information regarding its employees on a person-by-person basis.

REQUEST NO. 10:

Provide a list of all Respondent's facilities and locations in existence during the relevant time period.

RESPONSE TO REQUEST NO. 10:

The following is a list of all McLane Company, Inc.'s grocery locations.

Division	Phone	Address
McLane Carolina	252-972-2500	7253 NC Hwy 48, Battleboro, NC 27809
McLane Concord	603-746-8000	932 Maple Street, Contoocook, NH 03229
McLane Cumberland	859-887-8200	1040 Baker Lane, Nicholasville, KY 40356
McLane Dothan	334-678-2700	100 McLane Parkway, Cottonwood, AL 36320
McLane High Plains	806-766-2900	1717 E. Loop 289, Lubbock, TX 79403
McLane Mid Atlantic	540-374-2000	56 McLane Drive, Fredericksburg, VA 22406
McLane Midwest	217-477-7500	3400 E. Main St., Danville, IL 61834
McLane Minnesota	507-664-3000	1111 West 5th Street, Northfield, MN 55057
McLane New Jersey	856-351-6200	742 Courses Landing Road, Carneys Point, NJ 08069

McLane Northeast	315-638-7500	2828 McLane Drive, Baldwinsville, NY 13027
McLane Northwest	253-512-1800	9611 45th Avenue SW Bldg. 4, Lakewood, WA 98499
McLane Pacific	209-725-2500	3876 E. Childs Avenue, Merced, CA 95341
McLane Pennsylvania	570-330-8400	43 Valley View Business Park, Jessup, PA 18434
McLane Southeast	706-357-9540	300 Hwy. 29 North, Athens, GA 30603
McLane Southern	601-833-6761	2104 E. Manufacturers Blvd., NE, Brookhaven, MS 39601
McLane So. California	909-887-7500	4472 Georgia Blvd., San Bernardino, CA 92407-1857
McLane, Southwest	254-770-2800	2828 Industrial Blvd., Temple, TX 76501
McLane Suneast	407-931-5200	1818 Poinciana Blvd., Kissimmee, FL 34758
McLane Sunwest	623-935-7500	14149 W. McDowell Rd., Goodyear, AZ 85395
McLane Western	303-682-7500	2100 East Ken Pratt Blvd., Longmont, CO 80504

REQUEST NO. 11:

For all Respondent facilities/locations nationwide during the relevant time period and with respect to any test or variation identified in #5 and #6 above, provide documents or a list of information identifying all persons by name, last known home address and telephone number, and social security number, who were:

a. terminated because of an inability to pass any test or variation,

b. reassignment and/or transferred because of an inability to pass any test or variation,

c. not hired because of any inability to pass any test or variation,

d. not promoted because of an inability to pass any test or variation.

RESPONSE TO REQUEST NO. 11:

Please refer to the response to request number nine.

REQUEST NO. 12:

For each person identified in 11(a) through 11(d), provide

a. date of termination, reassignment, transfer, not hired or not promoted,

b. name and title of the individual who made the decision to terminate, reassign, transfer, not hire and/or not promote the person based on test results.

RESPONSE TO REQUEST NO. 12:

Please refer to the response to request number nine.

REQUEST NO. 13:

For each test or variation identified in #5 or #6, provide any and all evidence which shows any change, whether a reduction or increase, in workplace injuries.

RESPONSE TO REQUEST NO. 13:

As a preliminary matter, it is unclear what type of evidence the EEOC is requesting in order to show a reduction or increase in workplace injuries. For this reason, the Company objects to this request due to its breadth, ambiguity and scope. Notwithstanding these objections, the Company is evaluating what information is available, if any, that may be responsive to this request, and if applicable, will provide a supplemental response. At this time, the Company objects to this request as unduly burdensome as it would require the Company to produce or create information, stored electronically or otherwise, in a medium or format other than that in which it is maintained in the normal course of business, and would require the production and indexing of extensive electronically stored information

and other documentation, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the company that would outweigh the probative value of such information.

REQUEST NO. 14:

During the relevant time period, if Respondent received any formal or informal complaints by any employee other than Charging Party concerning the test(s), or any claims of discrimination based on sex and/or disability, submit the following:

a. name and job title of each person who complained,

b. name and job title of each person receiving each complaint,

c. date of each complaint,

d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken.

RESPONSE TO REQUEST NO. 14:

The Company objects to this request to the extent that it seeks information related to any

and all claims based solely on sex and/or disability. Regarding disability discrimination, the EEOC confirmed that it was not alleging that Ms. Ochoa's pregnancy was a disability protected by the Americans with Disabilities Act. *See* Interview with T. Hatch, Recording at 7:00-7:06. Likewise, complaints that are related to gender but not regarding or related to the IPCS test are beyond the scope of Ms. Ochoa's Charge and would not be relevant or reasonably calculated to lead to the discovery of admissible evidence in any proceeding related to the allegations in the Charge. The following complaints were received from employees in the grocery division whom alleged discrimination based on the use of the IPCS test.

Name	Job Title	Division	Date of Complaint	Subject Matter	Actions Taken/Status
Steve Banda	Forklift	McLane Pacific	9/22/2010	IPCS + Disability Claim	File with CA DFEH (Charge No. E2010011C0202-00-pe); Pending
Claudia Santillan	Selector	McLane Pacific	2/4/2008	IPCS + Gender Claim	File with Fresno, CA EEOC (Charge No. 607-CV-1625); Settled for $3,468.00 on 11/7/2008
Patricia Norman	Palletizer	Southeast	1/11/2008	IPCS + Race Claim	File with Atlanta, GA EEOC (Charge No. 11A-2208-00059); EEOC dismissed charge
Dick Shahenian	Mechanic Contractor	Contractor with McLane Pacific	Feb, 2009	IPCS + Disability/ Age Claim	File with Fresno, CA EEOC (Charge No. 485-2009-00229); Settled during EEOC mediation for $4,160.00 on 8/2009

REQUEST NO. 15:

Provide a list of all individuals who applied for a position, for which the test identified in #5 and #6 above was in use, at any location or facility of Respondent during the relevant time period. Annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

g. whether the applicant was hired, and date and reason for hire or non-hire

h. location at which they applied and

i. position for which they applied.

RESPONSE TO REQUEST NO. 15:

Please refer to the response to request number five.

REQUEST NO. 16:

Provide a list of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #5 and #6 above was in use,

at any and location or facility of Respondent during the relevant time period. Annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date promotion sought

g. whether the individual seeking promotion was selected and, if so, date and reason for selection or non-selection

h. location at which they sough [sic] promotion and position for which they sought promotion.

RESPONSE TO REQUEST NO. 16:

Please refer to the response to request number five.

REQUEST NO. 17:

Provide a list of all individuals who were employed by Respondent at any location or facility nationwide during the relevant time period. Provide a separate list of each facility/location nationwide and annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of hire

g. all position titles held

h. dates when each position title was held

i. termination date and reason, if applicable.

RESPONSE TO REQUEST NO. 17:

Please refer to the response to request number nine.

REQUEST NO. 18:

Provide a complete copy of Charging Party's personnel file, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by her, complaints made about her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, terminations, and reasons for separation or termination and Charging Party's medical file, including but not limited to test scores or results,

documentation from treating physicians, documentation from non-treating physicians, and medical or physical evaluations by Respondent's personnel.

RESPONSE TO REQUEST NO. 18:

The Company produced Charging Party's personnel file as Exhibit 55, and the confidential file as Exhibit 56, in response to the First RFI, dated November 13, 2009.

REQUEST NO. 19:

Provide complete copies of the personnel files, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by him or her, complaints made about him or her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination for Bobby Carlson (President), Theresa Hatch (Human Resources Manager) and Janann Williams (Vice President, People).

RESPONSE TO REQUEST NO. 19:

The Company objects to the request for the personnel files of Bobby Carlson, Theresa Hatch, and Janann Williams on the grounds that it seeks information and/or documents that are not relevant to the Charge under investigation or any aspect of any Charging Party's current or former employment with the company, and

therefore is not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related thereto the allegations in the Charge filed with the EEOC. Further, the production of Mr. Carlson's, Ms. Hatch's, and Ms. Williams' personnel files would require the Company to produce confidential information and/or documents concerning the Company's employees.

Sincerely,

SNELL & WILMER

/s/ Ashley Kasarjian

Joshua Woodard
Ashley Kasarjian

ATK:tt

[Doc. 9-1]

EXHIBIT 38

Snell & Wilmer
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LOS CABOS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

April 1, 2011

VIA FAX: (602) 640-5071
AND HAND DELIVERY

Rayford O. Irvin
Equal Employment Opportunity Commission
District Director (Issuing Official)
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012

Re: Petition to Revoke Subpoena No. PHX-11-42
Damiana Ochoa v. McLane Sunwest
Charge No.: 548-2008-01093

Dear Mr. Irvin:

Pursuant to 29 C.F.R. § 1601.16, Respondents McLane Company, Inc. ("McLane") and McLane/Suneast,

Inc. ("McLane Sunwest")[1] petition the EEOC to revoke Subpoena No. PHX-11-42, dated March 25, 2011 (the "Second Subpoena")[2], in the matter of *Ochoa v. McLane Sunwest* (Charge No. 540-2008-01093). The Second Subpoena is issued pursuant to Title VII (42 U.S.C. § 2000e-9) and seeks "testimony regarding the above referenced charge of discrimination from the key decision maker(s) in the process that led to Respondent's implementation of the Industrial Physical Capability Strength Test (IPCS) and Isokinetic Physical Capability Test (IPCT) tests or variation of the IPCS and the IPCT tests for the Food Services Division." *See* Second Subpoena, attached as Exhibit A. Respondents submit this petition to request that the Second Subpoena be revoked in its entirety, as it seeks irrelevant information and Respondents already have complied with all reasonable requests. Of significance, the "food service division" is operationally distinct from Ms. Ochoa's employer, McLane/Suneast, Inc. d/b/a McLane Sunwest—a grocery facility. Accordingly, in a process entirely separate and independent from the grocery

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[1] The EEOC issued the current Subpoena to McLane Company, Inc. However, the underlying Charge of Discrimination filed by Ms. Damiana Ochoa was filed solely against her employer, McLane Sunwest. Accordingly, both McLane Company, Inc. and McLane Sunwest petition the EEOC to revoke the Subpoena.

[2] The EEOC notes on the Second Subpoena that counsel for McLane Sunwest was sent a copy; however, to date, counsel has not received a copy from the EEOC. As Respondents frequently have requested, Respondents again request that the EEOC direct all future correspondence through counsel, rather than serving the CEO and failing to provide notice to counsel.

division's decision to use the IPCS test for grocery operations, McLane Foodservices, Inc. ("Foodservices"), a separate corporation and different employer, independently decided to use the IPCS test for its own employees a year prior to the grocery division.

As noted in earlier correspondence and discussed more fully herein, Respondents have concerns with the relevance, breadth and scope of the Second Subpoena and other information sought in this investigation. Notwithstanding such concerns, Respondents have consistently expressed a willingness to cooperate with the EEOC and have made efforts to confer with EEOC officials at many levels. However, the EEOC has not engaged in any substantive discussions with Respondents nor acknowledged Respondents' requests to meet. Rather, the EEOC continues to request additional data and information in a manner that calls into question whether the requests are offered for a legitimate purpose or constitute an abuse of process. Respondents remain committed to engaging in such discussions and information sharing; however, the EEOC's issuance of the Second Subpoena necessitates this Petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Respondents McLane Company, Inc. and McLane Sunwest

McLane Company, Inc. is a supply chain services company, providing grocery supply chain solutions for

convenience stores, mass merchants, drug stores, and military locations throughout the United States. In addition to having several distinct operating locations, McLane also has a number of completely separate subsidiary companies.

McLane/Suneast, Inc., d/b/a McLane Sunwest, is a subsidiary of McLane that operates as a grocery distribution center in Goodyear, Arizona. Since opening in 1985, it has provided services to its customers located in Arizona, Nevada, New Mexico and Texas. McLane Sunwest has been, and remains, committed to developing dedicated, well-trained teams that are focused on excellence. As an equal opportunity employer, McLane Sunwest prohibits unlawful discrimination in every aspect of the employment relationship. Further, McLane Sunwest is committed to protecting the safety and health of all its employees.

B. Ms. Ochoa's Charge of Discrimination

Ms. Damiana Ochoa ("Ms. Ochoa") filed a Charge of Discrimination against McLane Sunwest on January 7, 2008 alleging that she was discriminated against because of her sex (female) and alleged disability (pregnancy).[3] In her charge of sex and disability discrimination, Ms. Ochoa alleged as follows:

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[3] EEOC Investigator Barbara Rusden confirmed during the interview of Ms. Theresa Hatch that the EEOC was not alleging that Ms. Ochoa's pregnancy was a disability protected by the ADA.

> On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (physical capability strength test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007, and December 28, 2007, I retested and did not pass. I have worked for the above-named employer for over eight years as a cigarette selector.
>
> I believe I have been discriminated against because of my sex, female, (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> The physical capability strength test is given to all employees returning to work from medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended.

McLane Sunwest denies Ms. Ochoa's allegations in their entirety and provided the EEOC with evidence showing that she had not been discriminated against in any way. As explained in its position statement dated April 25, 2008, McLane Sunwest hired Ms. Ochoa as a Selector II/Mezzanine Selector. In this position, Ms. Ochoa was required to perform various physical tasks, such as: (1) pulling stacks of 25 empty totes to a staging area (which required up to 145 lbs. of force); (2) lifting totes off stacks and placing them on a

roller belt; (3) pushing/pulling totes up or down the roller belt; (4) stocking shelves; and (5) lifting/lowering/carrying/sliding 40 lb. wooden pallets. All physically demanding positions at McLane Sunwest are assigned either the "Medium," "Medium-Heavy" or "Heavy" category based upon the physical demands of the job requirements, as assessed by an independent ergonomic expert. Ms. Ochoa's position required "Medium-Heavy" lifting and physical exertion.

McLane and its subsidiaries take the safety of their employees seriously. Specifically, with regard to McLane Sunwest, in order to ensure that employees are capable of safely performing these physically demanding jobs, all newly hired employees, employees returning from an absence of thirty days or more, as well as individuals seeking a job that is more physically demanding than their current job, are required to take a physical capability exam known as the Industrial Physical Capability Strength Test (referred to as "PCE" or "IPCS test"). If an employee cannot meet the minimum strength requirement for the particular position, the employee may be given an opportunity to retest. During this time, the employee is encouraged to work to enhance his/her overall physical capability.

i. General Information Regarding IPCS Testing

Industrial Physical Capability Services, Inc. ("IPCS") oversees the testing in order to ensure objectivity, validity, and reliability. Over the past thirty

years, IPCS has provided its standardized capability assessments to numerous industrial clients in the trucking, distribution, airline, manufacturing and utility industries. Numerous comparative studies have evaluated the effectiveness of IPCS testing on the reduction in the frequency and severity of injuries. For example, in a 16-month analysis of new employees who were evaluated by IPCS testing, there was a 70.5% reduction in the incident rate of injury. In another study, 14 food distribution locations took part in a 35-month study that concluded that there was a dramatic impact on the reduction of the frequency and severity of injuries.

In order to match the physical capabilities of the worker to the physical demands of a particular job, a Job Task and Physical Activities Analysis is performed by an independent company that observes and analyzes the performance of the job duties. This analysis determines the target physical capability score required for each particular job. McLane Sunwest employees go to an approved clinic, with trained IPCS providers, to take the PCE. The PCE is performed on an isokinetic machine that focuses on the major muscle groups of the shoulders and legs, as strength in these two areas is necessary when performing the essential functions of these physically demanding jobs. The machine allows a dynamic evaluation of specific movement patterns and accommodates an individual's weaknesses and strengths by providing resistance equal to the force applied against the machine.

IPCS testing is critical at McLane Sunwest given the physically demanding nature of certain jobs. For example, a Selector II may pick approximately 2,300 pieces of product from racks to place in totes, filling 1,000 totes per shift.

ii. Ms. Ochoa's IPCS Testing

Ms. Ochoa requested and was granted FMLA leave for the birth of a child. Upon concluding her FMLA leave, she successfully completed the required "Return to Work" test and was promptly reinstated. In June 2007, Ms. Ochoa again requested and was granted FMLA leave for the birth of another child. Following the expiration of her second leave, Ms. Ochoa did not meet the minimum physical strength capability to safely perform the essential functions of her medium-heavy position—despite being given three separate chances at the physical capability examination. As a result of her third failure, IPCS concluded that she was unable to meet the minimum qualifications to perform the essential functions of her job. Because no alternative position existed at or below her strength capability, her employment was terminated on January 9, 2008.

iii. McLane Sunwest's Response to Ms. Ochoa's Charge

McLane Sunwest denies Ms. Ochoa's allegations in their entirety and has provided the EEOC with evidence showing that she had not been discriminated

against in any way. In response to Ms. Ochoa's Charge, McLane Sunwest submitted a position statement with 24 supporting exhibits on April 25, 2008. *See* Summary of Exhibits Produced, Exhibit B. In addition, in response to the EEOC's first Request for Information ("First RFI"), McLane Sunwest submitted a supplemental response and supporting exhibits 25-64 on November 13, 2009. McLane Sunwest also permitted the EEOC to conduct an on-site visit of the McLane Sunwest facility, and agreed to the interview of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010. As discussed in Section C below, McLane Sunwest also provided the EEOC with additional information and produced exhibits 65-75 (including various subparts) on January 14, 2011, in response to the EEOC request for information ("Second RFI").

Among the documents disclosed were policies and procedures related to the IPCS test, documents related to Ms. Ochoa's taking of the test and her IPCS test results, a breakdown of all IPCS test results from McLane Sunwest and related data regarding the employees taking the test, the job task analysis for Ms. Ochoa's position and for other positions at McLane Sunwest and within grocery operations, the documentation employees receive regarding the IPCS testing, physical demands and strength definitions, a validation study and injury analyses prepared by IPCS, opinion letters regarding the validity of the IPCS test, Ms.

Ochoa's entire personnel file, and documents explaining the IPCS test.

C. The EEOC's Expansion of Ms. Ochoa's Charge

Notwithstanding the voluminous documents and data produced relating to Ms. Ochoa's Charge, the EEOC has continued to request more information and documents. First, apparently to avoid the statutory limit to its ability to investigate Ms. Ochoa's Charge under Title VII, the EEOC simply added an additional charge number to its request for information relating to Ms. Ochoa's Charge and now claims to be investigating nationwide ADEA compliance. In doing so, the EEOC argues that the nationwide scope of its subpoena relating to Ms. Ochoa's Charge is justified. Thus, without an actual Charge of Discrimination, Charging Party, or Commissioner's Charge, the Phoenix office of the EEOC expanded the Ochoa sex discrimination investigation into an ADEA investigation of McLane Company, encompassing all related entities nationwide. Notably, Ms. Ochoa was not 40 years old or older at the time of her employment with McLane Sunwest, and would not have been afforded the protections of the Age Discrimination in Employment Act, as amended by the Older Workers Benefits Protection Act.

Moreover, although asked, EEOC Investigator Barbara Rusden stated that the EEOC was not willing

to explain the basis for this EEOC-initiated investigation or why it is warranted or justified. While the request for age-related data was removed from the request regarding Ms. Ochoa's Charge—it remains on the "separate" ADEA Charge—and the EEOC has continued to assert that it is expanding the scope of its investigation of Ms. Ochoa's Charge nationwide, despite the fact that the Company is comprised of operationally-distinct divisions and/or entities.

In a letter dated September 3, 2010, McLane made clear that it was willing to cooperate with any reasonable investigation conducted by the EEOC, but pointed out that the EEOC never provided McLane a copy of the purported new Charge or any other notice of the purported ADEA allegations warranting an expanded "nationwide investigation" of ADEA compliance. McLane explained that it could not begin to analyze the EEOC's extensive requests for information without such notice. McLane also raised concerns with the intermingling of this purported new ADEA Charge and Ms. Ochoa's Charge and the suspicious timing of the request, following objections to the investigation exceeding the scope authorized by Title VII. McLane asked the EEOC for some explanation of the basis for investigating ADEA compliance, including requesting a copy of the Charge referenced. McLane also expressed its willingness to cooperate and requested clarification as to the EEOC's significant request by correspondence dated December 7, 2010, telephonically during a conversation with Ms. Rusden on January 12, 2011, and again, on January 19, 2011.

At the same time the EEOC initiated the ADEA investigation, the agency sent identical requests for information requesting nationwide information from all facilities and subsidiaries of McLane relating to claims of gender and disability discrimination. Ms. Rusden subsequently apologized for intermingling the two requests, and then, sent two nearly identical requests to Respondents. Accordingly, McLane Sunwest responded to the EEOC's amended Second RFI and provided additional documentation relating to McLane Sunwest and other grocery operations. McLane Sunwest further objected to any further expansion of nationwide data, as any requests for information relating to Foodservices would not be relevant to Ms. Ochoa's employment or allegations and could not have arisen from Ms. Ochoa's Charge.

On February 15, 2011, the EEOC issued Subpoena No. PHX-11-32 ("First Subpoena") requesting 18 categories with 79 subparts of documents and information relating to the matter of *Ochoa v. McLane Sunwest*. Respondents filed their Petition to Revoke Subpoena No. PHX-11-32 on February 22, 2011 ("First Petition"), and explained that many responsive documents had already been produced and reiterated their concerns regarding the breadth and scope of the First Subpoena and information sought. Further, Respondents expressed their commitment to engaging in good faith discussions and information sharing. Of significance, the expansive requests for information were nearly identical (even after their revision) to the subpoena issued regarding the ADEA investigation.

The EEOC has not made a determination relating to the First Petition. *See* 29 C.F.R. § 1601.16(b)(2) ("Within eight calendar days after receipt or as soon as practicable, the General Counsel or Director, as appropriate, shall either grant the petition to revoke or modify in its entirety or make a proposed determination on the petition, stating reasons, and submit the petition and proposed determination to the Commission for its review and final determination."). Rather than address the merits of the First Petition, the EEOC issued its Second Subpoena. It is unclear why the EEOC has failed to respond to Respondents' objections set forth in the First Petition, but rather, continues to seek irrelevant and overbroad information in what appears to be an abuse of process.

D. The Second Subpoena and the EEOC's Continued Expansion of Ms. Ochoa's Charge

The EEOC issued the Second Subpoena on March 25, 2011, seeking "testimony regarding the above referenced charge of discrimination from the key decision maker(s) in the process that led to Respondent's implementation of the Industrial Physical Capability Strength Test (IPCS) and Isokinetic Physical Capability Test (IPCT) tests or variation of the IPCS and the IPCT tests for the Food Services Division," a corporation that is operationally distinct from Ms. Ochoa's employer, a grocery operation. On the same date, the EEOC issued an identical subpoena to McLane Company ("Second ADEA Subpoena"), pursuant to the

ADEA (29 U.S.C. § 626(a)) requesting exactly the same testimony. *See* Second ADEA Subpoena, Exhibit C.[4]

For the second time, the EEOC has issued a nearly identical subpoena relating to the ADEA investigation. As discussed in McLane's correspondence dated September 3, 2010 and January 14, 2011, and the Petition to Revoke dated February 22, 2011, Respondents are concerned with the intermingling and timing of the requests for documents, information and testimony in Ms. Ochoa's matter and the new EEOC initiated investigation regarding the ADEA. *See, e.g.*, *EEOC v. Bashas*, 2009 WL 3241763 (D. Ariz. Sept. 30, 2009) (discussing the issuance of a subpoena for harassment or ulterior motives). Now, the Second Subpoena contains identical requests for testimony relating to the implementation of the IPCS and IPCT testing in the "food services division." The continued intermingling Ms. Ochoa's Charge and the purported ADEA Charge seems to be another tactic employed by the EEOC to expand the Ochoa investigation beyond what is statutorily authorized under Title VII and harass Respondents, despite Respondents' production of voluminous documents, making available individuals from management for the EEOC to interview, offering an on-site

[4] The only issue for consideration as to this petition is the expansion of Ms. Ochoa's Charge, as the Subpoena issued relating to the ADEA investigation will be addressed in separate correspondence by Morgan, Lewis & Bockius LLP, on behalf of McLane Company, Inc. However, the Second ADEA Subpoena is offered as an attachment to this petition due to the Respondents' concerns regarding the intermingling of the investigations.

visit of McLane Sunwest, and—for over three years—reasonably complying with the EEOC's requests.

McLane Sunwest would be open to any suggestions from the EEOC if the EEOC believes there is a better test than the IPCS test to protect employees who work in physically-demanding jobs. However, Respondents have no indication that any other option exists that better protects its employees against workplace injuries so they can safely perform their jobs. Nor have Respondents been provided any indication that any other test can do so in such an objective and independent manner that is also job related and consistent with business necessity. In an effort to *protect* its employees from injuries, Respondents have been penalized by the EEOC through the continuous barrage of burdensome and irrelevant requests relating to this testing, while the EEOC has refused to engage in any meaningful discussion to get to the crux of the issue—the validity of the IPCS test.

II. OBJECTIONS TO THE SECOND SUBPOENA

The Second Subpoena is objectionable as it exceeds the scope of Ms. Ochoa's Charge and seeks evidence that is not relevant or material to the investigation, as Foodservices is a separate company from Ms. Ochoa's employer, McLane Sunwest, a grocery operation. Moreover, McLane Sunwest has

already provided the EEOC with a substantial volume of data, information and documents.[5]

A. The Testimony Sought is Outside the Scope of Ms. Ochoa's Charge and Does Not Seek Evidence Relevant or Material to the Investigation

Respondents object to the expansion of the investigation outside the scope of the underlying Charge into a separate entity in which Charging Party was not even employed. An investigation into all McLane entities is overly broad, unduly burdensome, and seeks information that is not relevant to the underlying

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[5] While the Second Subpoena is addressed to Mr. Grady Rosier, President/CEO of McLane and states "YOU ARE HEREBY REQUIRED AND DIRECTED" to testify, Ms. Rusden confirmed via voicemail on March 31, 2011 that the EEOC was not seeking to interview Mr. Rosier. Rather, the EEOC was seeking to interview the individual(s) most knowledgeable about when the IPCS test was first used at any McLane facility. Accordingly, while an objection specifically to the subpoena of Mr. Rosier does not appear necessary at this time, Respondents reserve the right to object to Mr. Rosier's interview/deposition. *See, e.g.*, *Liberty Mut. Ins. Co. v. Superior Court of San Mateo County*, 13 Cal.Rptr.2d 363, 367-68 (App. 1992) ("[I]t amounts to an abuse of discretion to withhold a protective order when a plaintiff seeks to depose a corporate president, or corporate officer at the apex of the corporate hierarchy, absent a reasonable indication of the officer's personal knowledge of the case and absent exhaustion of less-intrusive discovery methods."); *Baine v. General Motors Corp.*, 141 F.R.D. 332 (M.D. Ala. 1991) (granting a protective order for the deposition of an automobile manufacturer executive because no showing was made of unique personal knowledge, and no effort was made to exhaust less-intrusive discovery methods).

Charge of Discrimination. *See, e.g.*, *E.E.O.C. v. Quantum Foods, LLC*, 2010 U.S. Dist. LEXIS 41846, *12-14 (N.D. Ill. Apr. 26, 2010) ("[A]n investigation extending to Quantum's other facilities at this time would amount to a 'fishing expedition.'").

The employees in Foodservices are not similarly situated to the employees at McLane Sunwest, the grocery operation in which Ms. Ochoa was employed. In addition to the fact that the separate McLane facilities are independent centers, Foodservices is a separate and distinct company operationally. As Ms. Janann Williams explained during her August 5, 2010 interview, the decision to use the IPCS test in the grocery division was made independently of the decision to use the IPCS test in Foodservices. Ms. Williams further noted that each division had its own Job Task Analyses prepared. Accordingly, the prior actions of Foodservices are not the subject of or related to Ms. Ochoa's Charge. Ms. Ochoa was never employed by Foodservices, and none of her allegations relate to the food service distribution centers. The EEOC's request, seeking information and documentation from a distinct company and distinct operations of McLane Company, Inc. could not fairly or accurately be argued to have arisen from the EEOC's investigation of Ms. Ochoa's Charge.

Moreover, by email to Ms. Rusden dated September 21, 2010, it was explained that Foodservices made the decision to use the IPCS test in fall of 2003, and the actual testing began in January 2004. Separate and apart from the decision by Foodservices, the grocery division started discussing the IPCS test in the

fall of 2004, with actual testing beginning in March 2005. Testimony regarding the decision to implement the test by Foodservices in 2003 could not even arguably be related to Ms. Ochoa's Charge filed in 2008. Beyond the timing, the issues considered and the history of a test in a different company, with different operational needs and different employment demands, has no relevance to the selection and application of the IPCS test at McLane Sunwest.

Accordingly, the testimony sought is not relevant to the Charge under investigation or any aspect of any Ms. Ochoa's employment with McLane Sunwest and/or the validity of the IPCS test, and therefore is overbroad and not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related thereto the allegations in the Charge.

B. Respondents' Cooperation with the EEOC and its Investigation

McLane Sunwest has cooperated with the EEOC and its investigation of Ms. Ochoa's Charge, and is willing to continue complying with the agency's requests for information, to the extent they are reasonable and within the agency's statutory authority. Moreover, as reiterated on multiple occasions, Respondents have been and remain willing to provide information to allow the EEOC to analyze the validity of the IPCS test in order to avoid the burden and expense of production of the vast amount of information sought on a nationwide basis.

Notably, McLane Sunwest has already produced 75 exhibits, many with subparts, in response to Ms. Ochoa's Charge and the EEOC's requests for information. Included in its production, McLane Sunwest has provided specific data regarding the IPCS testing at its location. In particular, the EEOC was provided with an excel file containing the employees' gender, test date, test reason, job class, job target, whether the employee met the minimum requirements of the position he or she was testing for, and the level he or she met.

As illustrated by McLane Sunwest's previous responses to the EEOC's requests for information, Respondents are committed to working with the EEOC to provide relevant information and to further produce relevant information in a less burdensome procedure. However, the scope of the Second Subpoena is particularly troublesome—especially given that the EEOC has (1) not analyzed the validity of the test which could render moot the need for much of the information sought in the Subpoena; (2) not acknowledged or responded to Respondents' request to meet regarding the EEOC's requests and information gathering; and (3) not even addressed Respondents' First Petition.

III. CONCLUSION

As demonstrated in the information and interviews provided to date, the employees of Foodservices are not similarly situated to Ms. Ochoa—or any other employee in the grocery division. Further, the decision

to use the IPCS test in Foodservices was made independently of the decision relating to grocery operations. Accordingly, Respondents do not believe that the request—seeking testimony relating to a distinct company—can fairly or accurately be argued to have arisen from the EEOC's investigation of Ms. Ochoa's Charge.

Throughout its investigation, the EEOC has sought information beyond what is relevant to Ms. Ochoa's allegations. Although Ms. Ochoa alleged only gender and disability discrimination relating to her attempt to return to work at McLane Sunwest, the EEOC has sought broad nationwide, company-wide information regarding all facilities, business divisions, and related entities far beyond Ms. Ochoa's allegations. The Company is willing to carefully evaluate any reasonable request for information relevant to Ms. Ochoa's Charge. However, the Company respectfully objects to the EEOC's Second Subpoena, attempting to expand the investigation outside the scope of the underlying Charge into a separate corporation in which Charging Party was not even employed. For the foregoing reasons, Respondents respectfully request that the Second Subpoena be revoked.

Sincerely,

SNELL & WILMER

/s/ Ashley Kasarjian
Joshua R. Woodard
Ashley T. Kasarjian

MORGAN, LEWIS &
BOCKIUS L.L.P.

/s/ Ellen Perlioni/with permission
Ronald E. Manthey
Ellen L. Perlioni

cc: Barbara Rusden
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* * *

[Doc. 9-2]

EXHIBIT 41

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SALT LAKE CITY
TUCSON

December 22, 2011

Meenoo Chahbazi
U.S. Equal Employment Opportunity Commission
Phoenix District Office
3300 N. Central Avenue, Suite 690
Phoenix, Arizona 85012-2504

Re: *Ochoa v. McLane Sunwest, Inc., Charge No: 540-2008-01093*

Dear Ms. Chahbazi:

Respondent McLane/Suneast, Inc. ("McLane Sunwest" or the "Company") hereby supplements its December 6, 2011 response to the EEOC's November 2, 2011 correspondence. The Company has expended a significant amount of time and effort and has devoted a significant amount of resources to ensure that it is providing as accurate and complete information as possible. The Company has responded to the EEOC's comments below and trusts that this will assist with informally resolving some or all of our disputes. The Company is still working diligently to address the remaining requests, and will supplement this response as reasonably as possible.

Please note that all responses, objections and other defenses identified in McLane Sunwest's previous correspondence, including but not limited to the petitions to revoke, dated February 22, 2011 and April 1, 2011, even if not specifically stated below, are hereby incorporated by this reference.

I. Subpoena for Documents

3. McLane Sunwest: Please refer to McLane Sunwest's response on December 6, 2011.

5b. Provide documents which reflect the name of each test's or variation's author or creator; the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

EEOC Response: Respondent has provided some information in response to this request, however, the information is incomplete. Documentation has been provided (e.g, an addendum contained in Exhibit 28) noting that the two associated appendices (dated June 5, 1999 and July 2, 1998) contain validation studies that were used to establish the IPCS cut-off scores for Medium, Heavy and Very Heavy. These studies were conducted on behalf of American Airlines. Based on the information provided, it is not clear whether the IPCS PCE was originally developed for use with material handlers in the airline industry. The Commission requests that Respondent provide documents clarifying the creation date of the test and the employer or industry for which the test was originally designed. Additionally, the Commission requests that Respondent provide information about how the IPCS test was developed and used for food services.

McLane Sunwest: It is the Company's understanding that a validation study was conducted in collaboration with American Airlines. McLane

Sunwest, however, does not believe that the IPCS PCE was developed exclusively for use with material handlers in the airline industry. It is the Company's understanding that the IPCS PCE was developed for use in a wide variety of industries with positions correlating to the physical capability categories developed by the Department of Labor. McLane Sunwest cannot independently corroborate the creation date for the IPCS PCE. Based on the literature provided by IPCS, Dr. Thomas Gilliam founded IPCS in August, 1998, and the IPCS test has been validated several times since its development.

McLane Sunwest objects to the EEOC's request for information relating to McLane Foodservices, Inc. ("Foodservices"), a separate company from Ms. Ochoa's employer, McLane Sunwest (a grocery operation), as such a request is not relevant to Ms. Ochoa's employment or allegations and could not have arisen from Ms. Ochoa's Charge.

Aside from the information provided above and in the documents produced to date, McLane Sunwest does not have any information as to Dr. Gilliam's other clients or industries serviced.

5c. Provide documents which describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the

process. Include copies of all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include copies of any and all documents reviewed by any key decision makers in addition to paragraph 6 below,

EEOC Response: Respondent's current response is incomplete. Janann Williams, Vice President of People, indicated during an interview with the EEOC that a committee (which she stated consisted of herself, Jose Mirales [sic] (Risk Manager), Jim Sanders (Regional Vice President), Jim Trent (Regional Vice President), Mike Youngblood (President of Grocery Division), Dave Testro (Regional Vice President)) was responsible for the decision to implement the test, a process that she notes included "meetings, phone calls, letters" and involved a "back and forth" between the committee and Dr. Thomas Gilliam.

The Commission requests that Respondent provide clarification as to who was on this committee, and provide copies of associated correspondence (e.g., email, memoranda, etc.) among committee members and with the committee and Dr. Gilliam, other employees of IPCS, and any other individuals or organizations consulted in the committee's deliberative efforts concerning the implementation of the IPCS PCE.

McLane Sunwest: As noted, Ms. Janann Williams met with EEOC representatives to discuss the decision to utilize and implement the IPCS PCE. While the phrase "committee" has been

generally used, please note that there was no formal "committee" established to evaluate the IPCS PCE. Rather, certain individuals were consulted as the grocery division was deciding whether to implement the IPCS PCE.

Additionally please refer to the documents attached as Exhibit 77 regarding the IPCS PCE. McLane Sunwest is in the process of determining if there are any additional documents responsive to this request, and will supplement this response accordingly.

5d. Provide documents which reflect the effective dates of use of each test or variation at each of Respondent's locations.

EEOC Response: The Commission has not received information responsive to the request concerning the dates at which the test was implemented for hiring, promotion, transfer or return-to-work for each position at each location. Please provide the date that IPCS PCE was implemented for each position at each of Respondent's locations.

McLane Sunwest: Please refer to McLane Sunwest's response on December 6, 2011. Additionally, the EEOC has requested dates specific to hiring, promotion, transfer, or return-to-work for each location. To clarify, once the IPCE [sic] **PCE was implemented at a location, it applied to all new hires, all employees seeking an alternative position that had greater minimum strength requirements, and all employees returning from**

a leave of absence of 30 days or more-assuming the position was physically demanding such that the IPCS PCE was required. The Company is unaware of information that suggests implementation dates differed for new hire testing versus other types of testing.

5f. Provide documents which reflect a description of how each test or variation is administered and scored. Include documents which reflect a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

EEOC Response: The information provided by Respondent in response to this request is incomplete. The documentation (e.g. Exhibit 26 and Exhibit 28) provided by Respondent references several pieces of information that contribute to the final ICPS [sic] *PCE score, e.g., peak torque, body symmetry ratio scores, force curve analysis and body weight. The documentation provided indicates that these measures are "applied to a validated mathematical model, which generates the IPCS physical capability index score" (Exhibit 26), and that "the data [are] combined using a mathematical*

model to generate a single digit physical capability score" (Exhibit 28).

However, no responsive documents have been provided explaining how these various measures are combined to arrive at a final score, and no responsive documents or information has been provided concerning the details of the mathematical model. Understanding the IPCS score and how it is used requires understanding the details of how it is calculated.

Provide documents describing the process by which the measurements obtained in the Industrial Physical Capability Services, Inc. (IPCS) physical capability evaluation (PCE) (e.g, peak torque, body symmetry ratio scores, force curve analysis, body weight, etc.) are combined to arrive at the final IPCS physical capability index score—i.e., the "validated mathematical model, which generates the IPCS physical capability index score" referenced in "The IPCS Score—What Is It?" (Exhibit 26). The documents and information provided should include details explaining how each measurement obtained is combined with other measurements to arrive at the "final absolute score" referenced in "The IPCS Score—What Is It?", and how this "final absolute score" is used to arrive at the IPCS physical capability index score. Include any available documentation (e.g, technical documentation developed by IPCS or Respondent, etc.) that details the process.

McLane Sunwest: McLane has provided substantial documents and information relating to the IPCS PCE. As explained previously and in

documents provided, to calculate the IPCS score from the isokinetic evaluation, the following measurements are necessary:

- Peak Torque—how many foot pounds of torque are generated during each major movement pattern (*i.e.*, knee flexion/extension and shoulder flexion/extension).

- Body Symmetry ratio scores—the relationship of various body segments is critical to the worker performing the essential functions of the job safely. Specifically, the relationship of the shoulder flexors to the shoulder extensors, knee flexors to the knee extensors, right to left comparisons for the flexors and extensors for the shoulder and knee. In addition, the upper strength relative to the lower body strength is determined.

- Force curve analysis—each major set of force curves is objectively evaluated for normalcy. The score ranges from 0.0 to 1.0 where 0.0 is a flat line curve (no force generated) to a perfect shaped curve, which is a 1.0. The force curve is not determined by age or gender. Perfect force curves can be generated by young and old or male and female.

- Body weight—body weight is divided into the final absolute score. Body weight is used to make sure the force generated is adequate to not only support an individual's body weight but also to safely perform the essential functions of the job. This means that a

person who weighs 250 pounds needs to generate more torque that [sic] **a person who weighs 150 pounds.**

The body weight factor also has the effect of neutralizing differences between genders since (generally) most females weigh less than males.

These measurements are then applied to a "validated mathematical model," which generates the IPCS physical capability index score. It is the Company's understanding that this mathematical formula is considered highly confidential and proprietary to Industrial Physical Capability Services, Inc. McLane Sunwest does not know and cannot provide the mathematical formula.

McLane Sunwest has the following understanding of the IPCS PCE. This general summary is not intended to be a technical analysis of the IPCS PCE but, rather, is provided by McLane Sunwest in an attempt to identify as much information within its possession as possible to respond to the EEOC's request.

IPCS uses isokinetic machines to perform strength testing. The term "isokinetic" refers to a certain type of evaluation. There are several different machines that perform isokinetic evaluations. IPCS uses either a Biodex machine or a Cybex machine. An isokinetic machine has a dynamometer that the individual works against to generate force. The machine will reciprocate,

equal to the amount of force applied to the lever arm.

IPCS has providers around the country that conduct physical capability evaluations for IPCS. The clinician who administers the PCE for IPCS is a physical therapist, physical therapist assistant, or certified athletic trainer who has demonstrated that he/she can administer an isokinetic evaluation. These clinicians administer the isokinetic evaluation according to IPCS protocol, which is a standard protocol found in any isokinetic manual, and they submit the results to IPCS for data interpretation. The providers who perform the isokinetic evaluations do so on a day-to-day basis and are familiar with the equipment and how to use it.

The major leg muscle groups that IPCS measures are the knee flexors and knee extensors. The knee flexors, for the most part, are the hamstring muscles located in the back of the thigh. The knee extensors are the quadriceps muscles which primarily are located in the front of the thigh. When an individual is sitting on a bench, his or her knee is flexed at 90 degrees. Knee extension is the process of extending the knee or straightening out the leg so that it is parallel to the ground. Knee flexors are the muscles used when bringing the knee back to flex position, or the 90 degree position, where the individual started.

IPCS measures the muscle groups of the shoulders including the shoulder flexors and the shoulder extensors. The movement patterns that are evaluated are the shoulder flexion and the shoulder extension. The IPCS measurement of the shoulder flexor does not include just a single muscle but, rather, the strength of approximately a dozen muscles. This group of muscles is critical to performing the shoulder flexion movement. Shoulder flexion refers to the process of moving the arm from down at the side to straight in front of an individual to approximately ear height. Shoulder extension refers to the process of returning the arm back down to the starting position.

One advantage of the isokinetic evaluation is that it takes resistance into account. The isokinetic machine provides resistance equal to the amount of force put into the machine. IPCS factors in body weight to neutralize differences in body size. IPCS does not use BMI in calculations. The computer analysis consists of evaluating, measuring and rating the force curves to identify the amount of torque. Through a proprietary mathematical model that Dr. Gilliam created, the IPCS PCE looks at a variety of muscle symmetry scores (*i.e.*, how does the right shoulder flexor compare to the left shoulder flexor). The force curves are factored in as part of the interpretive process, and then the final score is generated. It is compared against the target score

that was established through the job task analysis. If the score is below the target score, the person has not met the essential functions of the job for which he or she tested. If the score is equal to or above the target score, the person has met the essential functions of the job for which he or she tested.

IPCS' evaluations typically include two sets of force curves that include five repetitions in each set. The data is submitted to IPCS and entered into its proprietary software package. IPCS then reproduces the force curves and performs its own unique analysis.

The analysis is based on the data taken from the force curves and shows what the force curves look like and whether there are any muscle symmetries. This gets factored into IPCS' proprietary equation. All the data points (*e.g.*, there are thousands of data points for each curve) are entered into the system. The data curves are reproduced and then analyzed by IPCS' proprietary software package.

IPCS performs two concentric contractions. One is a shoulder flexion where the shoulder flexors contract and the other is a concentric contraction that occurs when the shoulder extensors bring the arm back down. IPCS' proprietary analysis of the force curve is computerized and the force curve analysis will rate the curves

from zero to one, one being a perfect curve. Zero is flat-line and generates no torque.

The analysis results in a final score which is compared to the target score established for the position. In other words, it shows whether an employee is able to safely perform the essential functions of the job for which he or she tested. The range of IPCS scores that constitute medium-heavy, for example, is from an IPCS score of 1.32 to an IPCS score of 1.55 (as reflected in the chart below). Force curves and muscle symmetry scores, divided by body weight, provide the range. IPCS relates this back to this correlation analysis performed based on injury history specific to the Department of Labor's strength definitions.

IPCS has been able to determine that when a person works in a certain range, such as the medium-heavy range, based on the measurements of the Department of Labor's strength definitions, the person who scored in the medium-heavy range was likely able to safely perform the essential job functions. Those persons who did not, (*i.e.*, those who scored below the applicable strength definitions but nevertheless attempted to work in that medium-heavy range) were at a substantial risk of being injured and/or putting their coworkers at risk.

The DOL physical capability category is determined through the job task analysis prepared

by GMSI. The following chart summarizes the physical demand categories and corresponding IPCS score:

Less than Sedentary		Exerting up to 5 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or a negligible amount of force frequently (activity or condition exists from 1/3 to 2/3 of the time) to move objects.
Sedentary	.2522	Exerting up to 10 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or a negligible amount of force frequently (activity or condition exists from 1/3 to 2/3 of the time) to move objects.
Light	0.59	Exerting up to 15 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or up to 5 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or a negligible amount of force constantly to move objects.

Light-Medium	**0.83**	**Exerting 15 to 20 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 5 to 10 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or greater than negligible up to 5 pounds of force constantly to move objects.**
Medium	**1.08**	**Exerting 20 to 35 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 10 to 15 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or greater than negligible up to 10 pounds of force constantly to move objects.**
Medium-Heavy	**1.32**	**Exerting 35 to 50 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 15 to 25 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or 10 pounds of force constantly to move objects.**

Heavy	**1.56**	**Exerting 50 to 75 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 25 to 40 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or 10 to 15 pounds of force constantly to move objects.**
Heavy-Very Heavy	**2.00**	**Exerting 75 to 100 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 40 to 50 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or 15 to 20 pounds of force constantly to move objects.**
Very Heavy	**2.43**	**Exerting in excess of 100 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or in excess of 50 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or in excess of 20 pounds of force constantly to move objects.**

It is the Company's understanding that IPCS developed the scoring through analysis of employees performing the type of work described in the physical capability rating, and that the mathematical formula utilized to determine the physical capability score is considered highly confidential and proprietary to Industrial Physical Capability Services, Inc. McLane Sunwest does not know and cannot provide the mathematical formula. For additional information, please refer to the documents attached as Exhibit 78.

These are the facilities currently being utilized to perform the IPCS PCE in the grocery division:

Division	IPCS PCE Facility
Carolina	Nash Day Hospital Outpatient Rehab Services, 2450 Curtis Ellis Drive, Rocky Mount, NC 27804
Concord	Professional Physical Therapy, 25 Hall Street, Suite 201, Concord, NH 03301
Cumberland	Urgent Treatment Clinic, 204 Bellaire Drive, Nicholosville, KY 40356
High Plains	OccMed Associates, 25 Briercroft Office Park, Lubbock, TX 79412
Mid Atlantic	On Site Facility, 10514 Wakeman Drive, Fredericksburg VA, 22407
Midwest	Pro PT, 3815 N. Vermillion Street, Danville, IL 61836
Minnesota	CSMR, 1381 Jefferson Road, Northfield, MN 55057

Ozark	St. Johns Urgent Care, 2120 West Carney, Springfield, MO 65803
New Jersey	Riverfront Medical Center, 510 Heron Drive, Swedesboro, NJ 08085
Northeast	Onondaga Physical Therapy, 7687 Frontage Road, Cicero, NY 13039
Northwest	Apple Physical Therapy, 3912 10th ST SE #101, Puyallup, WA 98374
Pacific	Yosemite Physical Therapy, 786 Loughborough Dr, Merced, CA 95348
Pennsylvania	Northeastern Occupational Medicine & Rehabilitation Center P.C., 769 Keystone Industrial Park, Dunmore PA. 18512
Southeast	Athens Regional Medical Center, 1199 Prince Ave., Athens, GA 30606
Southern	Physiotherapy Associates, 631 Brookway Blvd., Brookhaven, MS 39601
So. California	Central Occupational Medicine Providers, 4300 Central Ave, Riverside, CA 92506
Southwest	Select Physical Therapy, 1616 Azalea Drive, Temple, TX 76502
Suneast	Select Physical Therapy, 501 East Oak Street, Kissimmee, FL 34744
	Select Physical Therapy, 6000 Turkey Lake Road, Orlando, FL 32819
Sunwest	West Valley Rehab, 13460 N. 94th Drive, Suite G-1 Medical Center 2, Peoria, AZ
Western	The Therapy Center, 1330 Sunset Street, Longmont, CO 80501

5i. For each job or job classification for which a test or variation is used, provide documents which identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide documents which reflect the details on the process by which any scoring/classification system was established, and provide documents which reflect the details about the process by which Respondent determined the minimum score considered "passing."

EEOC Response: The documentation provided by Respondent relating to this request is incomplete. The documentation provided (Exhibit 8) includes physical demand strength definitions associated with each final IPCS target/cutoff score, but does not provide explanation of how each cutoff score was established given the strength definitions. Although the documents referenced in Exhibit 28 and the two associated appendices purport to provide information on how the IPCS cut-off scores for Medium, Heavy and Very Heavy strength designations were established, this information does not provide adequate explanation of the processes associated with the establishment of these cut-off scores, nor does this documentation provide information on how cut-off scores were established for the remaining strength designations utilized by Respondent (e.g, Medium-Heavy).

As a related issue, documentation (e.g, Exhibit 17, sample IPCS score report) suggests that there are minimum scores associated with total torque measures, total torque measures divided by body weight, IPCS

scores, and IPCS scores divided by body weight. However, no information has been provided on how these minimum scores were established for each measure. Understanding the IPCS score and how it is used requires understanding how the minimum score criteria were established. Provide documents that explain how the minimum score criteria were established for each measure, including the IPCS score as well as any score or measure that is used to calculate the IPCS score.

McLane Sunwest; Please refer to the Response to 5(f).

5k. Provide copies of any and all adverse impact studies performed for each test or variation.

EEOC Response: It is our understanding that Respondent did not conduct any adverse impact studies for the IPCS test. Please confirm that Respondent did not conduct any adverse impact studies or produce any responsive documents to this request.

McLane Sunwest: As previously advised, McLane Sunwest and/or the grocery division has not conducted any adverse impact studies, nor is it aware of any adverse impact studies and, therefore, has not produced any documents responsive to this request.

7. For all positions at Respondent's facilities/locations nationwide for which any test or variation identified in #4 and #5 above is used,

provide a copy of the Job Task Analysis for each position.

EEOC Response: There are several positions for which job task analyses have not been provided. Provide job task analyses for all positions for which the IPCS test is used, including any positions identified in (5g), above. Additionally, Respondent has not provided job task analyses for positions in food services. Please also provide job task analyses for all food service positions for which the IPCS test is used.

McLane Sunwest: McLane Sunwest has previously produced Job Task Analyses. The updated set of Job Task Analyses is produced as Exhibit 79. We are working on confirming whether additional JTAs exist for grocery positions and we will supplement if necessary and as reasonably possible.

8. For January 1, 2006 to the present date, provide documents or a listing of information identifying all persons who took any test or variation identified in #4 and #5 in connection with employment at any of Respondent's locations or facilities nationwide. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

g. date of hire (or promotion), and job classification at hire (or promotion)

h. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

i. position held at the time test was administered (for individuals employed at the time or returning to work)

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

EEOC Response: Respondent has failed to provide <u>any</u> *data for Respondent's facilities and locations nationwide. Respondent has also failed to provide many categories of data (i.e., data "variables") regarding Respondent's Goodyear, Arizona facility in its response to this request. Respondent has not provided the test*

taker's name, social security number, last known home address and phone number, date of birth, date of application, date of hire or promotion, job classification at time of hire or promotion, test date, position held and sought at the time the test was administered, date and reason for termination, and name and job title of any individual(s) responsible for the hiring, promotions, or termination decisions. Although, Respondent has provided "job class," it is unclear whether "job class" refers to positions sought or positions held. Additionally, because social security numbers have not been provided, it is not clear that the employee ID provided can in fact be used to uniquely identify individuals within the data file provided or link the present data to data contained in files that may be provided in response to subsequent requests. Respondent has also failed to provide adequate responses defining other variable response categories (e.g., meaning of each test reason category identified in the variable "TestReasonName"). Provide a complete response that includes data for Respondent's facilities and locations nationwide, data for all the missing variables, as well as complete explanations of the definitions for each variable response category (e.g., for the variable "TestReasonName," and "Job Class"), and whether there is an overlap or redundancy among variable response categories. Finally, Respondent has failed to provide data regarding food services. Please provide data for food services for the variables identified above and include information that is responsive to the requests outlined here.

McLane Sunwest: McLane Sunwest previously produced the data for McLane Sunwest as Exhibit 39. Regarding the EEOC's request for additional information regarding the headings:

- **Employee ID—refers to a unique identifier for each individual.**
- **Gender—the employee's sex.**
- **TestDate—refers to the date the employee took the IPCS PCE.**
- **TestReasonName—refers to the reason the employee indicated he or she was taking the IPCS PCE.**
- **Job Class—refers to the position for which the individual is taking the PCE to determine whether he or she is capable of performing the essential functions.**
- **Job Target—refers to the physical capability level the employee needed to safely perform the essential functions of the particular position.**
- **Met Min Req—refers to whether the employee has the physical capability to perform the essential function of the particular position.**
- **Level Achieved—refers to the physical capability shown by the individual on the particular IPCS PCE.**

McLane Sunwest is producing the data for the grocery division as Exhibit 80 (provided in

the enclosed CD). It is not clear why the EEOC needs the individual's names, medical condition (particularly considering Ms. Rusden informed counsel that the EEOC is not pursuing Ms. Ochoa's disability claim), social security numbers, last known addresses, phone numbers or other personal identifiers to analyze the validity and/or impact of the IPCS PCE.

McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011. Further, for the reasons stated above, McLane Sunwest objects to the request for data regarding Foodservices, Inc.

9. Provide documents which reflect or a list of all Respondent's facilities and locations in existence from January 1, 2006 to the present.

EEOC Response: Respondent has not provided information relating to food services. Provide the facilities and locations of McLane's food services division.

McLane Sunwest: McLane Sunwest has previously provided all information responsive to the grocery division. As stated above, McLane Sunwest objects to the request for data regarding Foodservices, Inc.

10. For all Respondent facilities/locations nationwide from January 1, 2006 to the present and with respect to any test or variation identified in #4 and #5 above, provide documents or a list of

information identifying all persons by name, last known home address and telephone number, and social security number, who were:

a. terminated because of an inability to pass any test or variation,

b. reassigned and/or transferred because of an inability to pass any test or variation,

c. not hired because of an inability to pass any test or variation,

d. not promoted because of an inability to pass any test or variation,

EEOC Response: Respondent has not provided any documentation in response to this request. Provide documents or a list of information identifying by name, last known home address and telephone number, and social security number all persons who did not pass the test and experienced termination, transfer, or were not hired or promoted.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011.

11. For each person identified in 10(a) through 10(d), provide documents which reflect:

a. date of termination, reassignment, transfer, not hired or not promoted,

b. name and title of the individual who made the decision to terminate, reassign,

transfer, not hire and/or not promote the person based on test results.

EEOC Response: Respondent has provided no responsive documents to this request. Provide the date when the employee or applicant was terminated, reassigned, transferred, or not hired or promoted, and the name and title of the person who made that decision based on test results.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011.

12. For each test or variation identified in #4 or #5, provide any and all documents evidencing any change, whether a reduction or increase, in workplace injuries.

EEOC Response: Respondent has not provided documents responsive to this request. Provide all responsive documents.

McLane Sunwest: McLane Sunwest is currently in the process of compiling and analyzing information relating to workplace injuries and the impact of the IPCS PCE. McLane Sunwest will supplement.

13. From January 1, 2006 to the present, if Respondent received any formal or informal complaints by any employee other than Charging Party concerning the test(s), or any claims of discrimination based on sex

and/or disability, submit documents evidencing the following:

a. name and job title of each person who complained,

b. name and job title of each person receiving each complaint,

c. date of each complaint,

d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken.

EEOC Response: Although Respondent has provided some information in response to this request, it has not provided information regarding whether there were any internal complaints other than EEOC Charges, the name and job title of each person who received the complaints, formal or informal written records regarding the complaints, and records of all actions taken in response to complaints.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011. To further clarify, McLane Sunwest does not track internal complaints regarding the IPCS test.

14. Provide documents or a list* of all individuals who applied for a position, for which the test identified in #4 and #5 above was in use, at any location or facility of Respondent during the relevant time period. Include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of application

g. whether the applicant was hired, and date and reason for hire or non-hire

h. location at which they applied and

i. position for which they applied.

EEOC Response: The Commission has not received documents or a list responsive to this request. Provide responsive documents or a list identifying the individuals who applied for a position for which the IPCS test was in use as well as responses to subparts a through i.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011. To further clarify, McLane Sunwest does not keep a list of all individuals who apply for positions, detailed information about the individuals, their application, and/or

position sought. Please refer to the response to Request No. 8 for information regarding the individuals who took the IPCS test in the grocery division.

15. Provide documents or a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #4 and #5 above was in use, at any and location or facility of Respondent from January 1, 2006 to the present. Include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date promotion sought

g. whether the individual seeking promotion was selected, and, if so, date and reason for selection or non-selection

h. location at which they sought promotion and

i. position for which they sought promotion,

EEOC Response: Respondent has not provided documents or a list responsive to this request. Provide

responsive documents or a list identifying the individuals who sought a promotion or were selected for a promotion for a position for which the IPCS test was in use; and provide responses to subparts a through i.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011. To further clarify, McLane Sunwest does not keep a list of all individuals who apply for positions, detailed information about the individuals, their application, and/or position sought. Please refer to the response to Request No. 8 for information regarding the individuals who took the IPCS test in the grocery division.

16. Provide documents or a list* of all individuals who were employed by Respondent at any location or facility nationwide from January 1, 2006 to the present. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of hire

g. all position titles held

h. dates when each position title was held

i. termination date and reason, If applicable.

EEOC Response: Respondent has provided no responsive documents to this request. Provide responsive documents or a list identifying the individuals who were employed by Respondent, and provide responses to subparts a through i.

McLane Sunwest: The Company remains perplexed by this request seeking personal information regarding every employee nationwide, regardless of position. The requested information is irrelevant to the EEOC's investigation and the EEOC was unwilling to discuss the relevance of this and other information when the parties met.

17. Provide complete copies of the personnel files, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by him or her, complaints made about him or her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination for Bobby Carlson (President), Theresa Hatch (Human Resources Manager) and Janann Williams (Vice President, People).

EEOC Response: Respondent has not provided responsive documents to this request. Please provide responsive documents.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011.

18. List any and all alternatives to the ICPS [sic] **or IPCT test that Respondent considered implementing in lieu of the ICPS** [sic] **or IPCT test. Include:**

a. copies of all documents Respondent reviewed in considering any such alternatives.

b. copies of all documents relating to any findings, analyses, determinations made by Respondent regarding any such alternatives.

EEOC Response: Respondent has not provided responsive documents. If Respondent did not consider implementing alternatives to the IPCS test, please state in your response that no alternatives to the IPCS test were considered by Respondent in lieu of the IPCS test.

McLane Sunwest: Some of the grocery distribution centers were using other PCEs prior to the IPCS PCE; however, the Company does not have knowledge that these were considered when implementing IPCS. We will supplement this response as additional information is discovered.

Subpoena for Witness Testimony

EEOC Response: Respondent has failed to comply with the Commission's subpoena for witness testimony "from the key decision maker(s) in the process that led to Respondent's implementation of the Industrial Physical Capability Strength Test (IPCS) and Isokinetic Physical Capability Test (IPCT) tests or variation of the IPCS and the IPCT tests for the Food Services Division." This witness testimony is relevant given that the Food Services Division also uses the IPCS and/or IPCT tests or variations. Please identify the witness and time of availability by November 22, 2011.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011. Of significance, the testimony sought is outside the scope of Ms. Ochoa's Charge and does not seek evidence that is relevant or material to the investigation.

Additionally, to generally supplement McLane Sunwest's production to date, please refer to the documents regarding the IPCS PCE produced as Exhibit 81. A document to be included in Ms. Ochoa's personnel file (previously produced as Exhibit 55), is produced as Exhibit 82. Further, correspondence regarding the validation of the IPCS PCE is produced as Exhibit 83.

As mentioned above, we are actively working to compile additional information and further respond. We will supplement this response as further information becomes available. In the interim, if you have any questions, please let us know.

Sincerely,

Snell & Wilmer, L.L.P.

/s/ Ashley Kasarjian
Joshua Woodard
Ashley Kasarjian

[Doc. 9-2]

EXHIBIT 42

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SALT LAKE CITY
TUCSON

February 22, 2012

VIA FAX: (602) 640-5071
AND HAND DELIVERY

Rayford O. Irvin
Equal Employment Opportunity Commission
District Director (Issuing Official)
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012

Re: **Supplemental Response to Subpoena No. PHX-12-20**
Ochoa v. McLane Sunwest,
Charge No. 540-2008-01093
Hernandez v. McLane Sunwest,
Charge No. 540-2011-02916
Banda v. McLane Pacific,
Charge No. E2010011CO202-00-pe

Response to Subpoena No. PHX-12-22
Hernandez v. McLane Sunwest,
Charge No. 540-2011-02916

Dear Mr. Irvin:

As discussed more fully in the Petition to Revoke the above-referenced Subpoena No. PHX-12-20, Respondent McLane/Suneast, Inc. (d/b/a "McLane Sunwest" and "McLane Pacific")[1] has legitimate concerns with the Subpoena, as well as the identical Subpoena

[1] The EEOC issued the current Subpoena to "McLane Company." However, this is not a valid corporate entity. The underlying Charges of Discrimination on which this Subpoena relies were all filed against McLane/Suneast, Inc., doing business in Goodyear, AZ as "McLane Sunwest" and doing business in Merced, CA as "McLane Pacific." Accordingly, McLane Sunwest and McLane Pacific are responding to the Subpoena.

No. PHX-12-22, purportedly issued under the Age Discrimination in Employment Act. Notwithstanding those concerns, McLane Sunwest and McLane Pacific have consistently expressed a willingness to cooperate with the EEOC. Without waiving the general and specific objections previously submitted in the Petition for Revocation, which are hereby incorporated herein by reference, McLane Sunwest and McLane Pacific provide the following supplemental response to the Subpoenas.

I. FACTUAL BACKGROUND

A. McLane Sunwest

McLane Company, Inc. ("McLane") is a supply chain services company, providing grocery supply chain solutions for convenience stores, mass merchants, and drug stores throughout the United States. In addition to having several discrete operating locations, McLane also has a number of completely separate subsidiary companies.

McLane/Suneast, Inc., d/b/a "McLane Sunwest" and/or "McLane Pacific," is a subsidiary of McLane that operates grocery distribution centers. McLane Sunwest and Pacific have been, and remain, committed to developing dedicated, well-trained teams that are focused on excellence. As equal opportunity employers, McLane Sunwest and McLane Pacific prohibit unlawful discrimination in every aspect of the employment relationship. Further, McLane Sunwest and McLane Pacific are committed to protecting the safety

and health of all employees, and employing individuals in positions in which they are capable of safely performing the essential functions of their jobs.

B. Use of the IPCS PCE for Placing Individuals in Positions They Are Capable of Safely Performing

McLane and its subsidiaries take the safety of their employees seriously. Specifically, with regard to McLane Sunwest and McLane Pacific, in order to ensure that employees are capable of safely performing the physically demanding jobs, all newly hired individuals, employees returning from an absence of thirty days or more, as well as employees seeking a job that is more physically demanding than their current job, are required to take a physical capability exam known as the Industrial Physical Capability Strength Test (referred to as "PCE" or "IPCS PCE"). If an employee cannot meet the minimum strength requirement in order to safely perform the essential functions for the particular position, the employee may be given an opportunity to retest. During this time, the employee is encouraged to work to enhance their overall physical capability.

Industrial Physical Capability Services, Inc. ("IPCS") oversees the testing in order to ensure objectivity, validity, and reliability. Over the past thirty years, IPCS has provided its standardized capability assessments to numerous industrial clients in the

trucking, distribution, airline, manufacturing and utility industries. Numerous comparative studies have evaluated the effectiveness of IPCS testing on the reduction in the frequency and severity of injuries. For example, in a 16-month analysis of new employees who were evaluated by IPCS testing, there was a 70.5% reduction in the incident rate of injury. In another study, 14 food distribution locations took part in a 35-month study that concluded that there was a dramatic impact on the reduction of the frequency and severity of injuries. McLane Sunwest previously provided the studies to the EEOC.

In order to match the physical capabilities of the worker to the physical demands of a particular job, a Job Task and Physical Activities Analysis is performed by an independent company that observes and analyzes the performance of the job duties. This analysis determines the target physical capability score required for each particular job. McLane Sunwest and McLane Pacific employees go to an approved clinic, with trained IPCS providers, to take the PCE. The PCE is performed on an isokinetic machine that focuses on the major muscle groups of the shoulders and legs, as strength in these two areas is necessary when performing the essential functions of these physically demanding jobs. The machine allows a dynamic evaluation of specific movement patterns and accommodates an individual's weaknesses and strengths by providing resistance equal to the force applied against the machine. Physical capability evaluations are critical at

McLane Sunwest and McLane Pacific given the physically demanding nature of certain jobs.

C. McLane Sunwest's and McLane Pacific's Cooperation with the EEOC

McLane Sunwest and McLane Pacific have made significant efforts to cooperate with the EEOC's ever expanding investigation. McLane Sunwest and McLane Pacific have produced volumes of documents and information to assist the EEOC with its investigation, including providing the EEOC with an excel file relating to all individuals who have taken the IPCS PCE in relation to all Grocery entities, as well as their gender, test date, test reason, job class, job target, whether the individual met the minimum requirements of the position, and the level he or she achieved.[2] Among numerous other things, McLane Sunwest and McLane Pacific also provided policies and procedures related to the IPCS PCE, documents related to charging parties' taking of the PCE and their IPCS PCE results, the job task analysis for all positions within all Grocery operations, the documentation employees receive regarding the IPCS PCE, physical demands and strength definitions, validation studies and injury analyses, opinion letters regarding the validity of the IPCS PCE, and various other documents and information explaining the IPCS PCE.

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[2] Similar data that also included the age of the individual at the time of the IPCS PCE was produced by McLane in response to the EEOC's ADEA investigation.

McLane Sunwest and McLane Pacific have consistently emphasized to the EEOC that if it has concerns with the IPCS PCE, or suggestions as to the use of the IPCS PCE, the company genuinely wants to hear them. McLane Sunwest's and McLane Pacific's primary goal has always been to safely employ people who are qualified to perform the essential functions of these physically demanding positions. Unfortunately, the only information McLane or McLane Sunwest or McLane Pacific have ever been given in their efforts to engage the EEOC in discussions was Investigator Rusden's comment to counsel for McLane that the EEOC was "looking for victims."

McLane Sunwest and McLane Pacific remain committed to cooperating with the EEOC as to the validity of the IPCS PCE. McLane Sunwest and McLane Pacific believe they are utilizing a validated PCE that adds significant value to the goal of placing teammates in positions they can safely perform. However, McLane Sunwest and McLane Pacific must object to the EEOC's fishing expedition to find "victims," without regard to the validity of the IPCS PCE.

II. SPECIFIC OBJECTIONS TO THE EEOC'S REQUESTS

REQUEST NO. 1: Provide documents describing the process by which the measurements obtained in the Industrial Physical Capability Services, Inc. (IPCS) physical capability evaluation (PCE) (e.g., peak

torque, body symmetry ratio scores, force curve analysis, body weight, etc.) are combined to arrive at the final IPCS physical capability index score.

a. Provide the "validated mathematical model, which generates the IPCS physical capability index score" referenced in the document "The IPCS Score—What Is It?" or the document "The IPCS Proprietary Formula—What Is It?" Provide a detailed explanation of how the "final absolute score" referenced in this document is calculated, and how this score used to arrive at the IPCS physical capability index score. If the "final absolute score" for a given individual and that individual's IPCS physical capability index score are one and the same, indicate this.

b. Include any available documentation (e.g. technical documentation developed by IPCS or McLane Sunwest, etc) that details the development, validation, and/or utilization of the "validated mathematical model."

RESPONSE TO REQUEST NO. 1: Based on literature from IPCS, McLane Sunwest and McLane Pacific believe that the IPCS PCE was developed by Dr. Thomas B. Gilliam based on many years of research and experience and it has been validated several times since its development. McLane Sunwest and McLane Pacific have provided substantial documents and information relating to the IPCS PCE. As explained previously and in documents provided: To calculate the IPCS score from the isokinetic evaluation, the following measurements are necessary:

☐ Peak Torque—how many foot pounds of torque are generated during each major movement pattern (i.e. knee flexion/extension and shoulder flexion/extension).

☐ Body Symmetry ratio scores—the relationship of various body segments is critical to the worker performing the essential functions of the job safely. Specifically, the relationship of the shoulder flexors to the shoulder extensors, knee flexors to the knee extensors, right to left comparisons for the flexors and extensors for the shoulder and knee. In addition, the upper strength relative to the lower body strength is determined.

☐ Force curve analysis—each major set of force curves is objectively evaluated for normalcy. The score ranges from 0.0 to 1.0 where 0.0 is a flat line curve (no force generated) to a perfect shaped curve, which is a 1.0. The force curve is not determined by age or gender. Perfect force curves can be generated by young and old or male and female.

☐ Body weight—body weight is divided into the final absolute score. Body weight is used to make sure the force generated is adequate to not only support an individual's body weight but also to safely perform the essential functions of the job. This means that a person who weighs 250 pounds needs to generate more torque that a person who weighs 150 pounds.

The body weight factor also has the effect of neutralizing differences between genders since (generally) most females weigh less than males.

These measurements are then applied to a "validated mathematical model," which generates the IPCS physical capability index score. It is McLane Sunwest's and McLane Pacific's understanding that Dr. Gilliam developed the mathematical formula over time and based on his vast experience in the industry. McLane Sunwest and McLane Pacific were informed that Dr. Gilliam had worked in the industry of performing isokinetic physical capability evaluations since 1982, and prior to that was a tenured faculty member at the University of Michigan where he was responsible for the isokinetic testing of the University's athletes. Dr. Gilliam provided McLane Sunwest and McLane Pacific with several validation studies done over the years and explained the variables in the mathematical formula as discussed above.

The exact mathematical formula itself, however, is considered highly confidential and proprietary to IPCS. McLane Sunwest and McLane Pacific do not know and cannot provide the mathematical formula. As such, McLane Sunwest and McLane Pacific have to object to this Request as seeking information not within their care, custody, or control. McLane Sunwest and McLane Pacific further object to this Request as seeking confidential, proprietary, and trade secret information belonging to IPCS.

REQUEST NO. 2: Job Task Analysis documentation provided to date indicates that video associated with the job task analyses is available.

a. Provide copies of any and all videos and/or any other recordings used for the purpose of analyzing the tasks performed for all positions for which a Job Task Analysis was completed.

b. Provide copies of any and all videos and/or any other recordings created in the course of the Job Task Analysis process.

RESPONSE TO REQUEST NO. 2: McLane Sunwest and McLane Pacific obtained the requested videos from GMSI and are producing copies relating to all Grocery operations herewith. *See* enclosed CD designated as Exhibit 84.

REQUEST NO. 3: Provide copies of any and all revisions of Job Task Analyses developed to date, including but not limited to those completed in 2011.

RESPONSE TO REQUEST NO. 3: McLane Sunwest has produced copies of JTAs relating to all Grocery operations. McLane Sunwest and McLane Pacific have also undertaken significant investigation to determine the accuracy and completeness of their production. As this investigation continues, McLane will produce any additional JTAs it discovers in relation to Grocery positions. Enclosed herewith are additional JTAs. *See* Exhibit 85.

REQUEST NO. 4: Provide the database compiled for McLane Sunwest by IPCS referenced in the document *New Hire Physical Capability Evaluation Proposal Presented to McLane Company, Inc.* Include a

description of all tables and data fields/variables included in the database.

RESPONSE TO REQUEST NO. 4: McLane Sunwest previously provided the EEOC with relevant information from this database relating to all Grocery operations. McLane Sunwest provided a CD with an excel spreadsheet that included identification numbers for each person taking the IPCS PCE, gender, location where they worked or sought to work, reason for taking the test, position sought, physical capability level achieved, and whether the physical capability achieved met the minimum requirement for the particular position, among other things.[3] At the EEOC's request, McLane Sunwest supplemented its responses to define the fields in the spreadsheet.

McLane Sunwest and McLane Pacific object to producing information already provided to the EEOC. McLane Sunwest and McLane Pacific also object to this request as irrelevant, overly broad, and seeking to harass the Company. McLane Sunwest and McLane Pacific further object to this request as seeking confidential information, including names and social security numbers.

REQUEST NO. 5: Provide copies of all status reports generated from the database referenced in the

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[3] McLane provided the EEOC with similar information but also including the individual's age as of the date of the test. As the EEOC knows, this information is already the subject of an EEOC-initiated enforcement action.

document New Hire Physical Capability Evaluation Proposal Presented to McLane Company, Inc.

RESPONSE TO REQUEST NO. 5: Neither McLane Sunwest nor McLane Pacific requested status reports from IPCS. In their efforts to cooperate with the EEOC, McLane Sunwest and McLane Pacific investigated whether other related entities within Grocery operations requested and received such status reports, Previously unknown to McLane Sunwest and McLane Pacific, three facilities within these related entities received such status reports on their own initiative. McLane Sunwest and McLane Pacific object to producing confidential information such as names and social security numbers. Subject to the confidentiality objection, McLane Sunwest and McLane Pacific are producing the status reports they have been able to locate through reasonable investigation. *See* Exhibit 86.

REQUEST NO. 6: Provide copies of any documentation prepared for McLane Sunwest by IPCS concerning the effectiveness of the IPCS PCE.

RESPONSE TO REQUEST NO. 6: McLane Sunwest and McLane Pacific have produced a substantial amount of information and documents responsive to this request. McLane Sunwest and McLane Pacific are currently unaware of any additional documentation that would be responsive, McLane Sunwest and McLane Pacific are, however, committed to continuing their investigation in this regard and will produce any additional responsive documentation discovered, subject to any confidentiality issues currently unknown.

III. CONCLUSION

As illustrated by McLane Sunwest's and McLane Pacific's previous responses to the EEOC's requests for information and responses herein, McLane Sunwest and McLane Pacific are committed to working with the EEOC to provide relevant information to facilitate the EEOC's investigation, particularly its consideration of the validity of the IPCS PCE.

Sincerely,

Snell & Wilmer

/s/ Joshua R. Woodard
Joshua R. Woodard

JW:mb

cc: Barbara Rusden
EEOC, Investigator
3300 North Central Ave., Ste, 690
Phoenix, Arizona 85012
Barbara.Rusden@EEOC.gov

[Doc. 9-2]

EXHIBIT 43

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DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

March 2, 2012

VIA HAND-DELIVERY

Barbara Rusden
Equal Employment Opportunity Commission
District Director (Issuing Official)
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012

Re: Charge No. 540-2008-01093

Dear Ms. Rusden:

Respondent hereby supplements its February 22, 2012 response to Request No. 2 seeking videos associated with the job task analyses. Enclosed are four additional videos relating to GMSI's Job Task Analyses.

Please let us know if you have any questions.

Very truly yours,

Snell & Wilmer

/s/ Joshua R. Woodard
Joshua R. Woodard

JHW/eiw:cg
Enclosures

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* * *

[Doc. 9-2]

EXHIBIT 47

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April 10, 2012

VIA FAX: (602) 640-5071
AND HAND DELIVERY

Rayford O. Irvin
Equal Employment Opportunity Commission
District Director (Issuing Official)
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012

Re: **Petition to Revoke Subpoena**
No. PHX-11-32
Damiana Ochoa v. McLane Sunwest
Charge No.: 548-2008-01093

Dear Mr. Irvin:

Respondent McLane/Suneast, Inc. (d/b/a/ "McLane Sunwest") hereby responds to the Final Determination dated March 21, 2012 ("Determination"), entered in response to McLane Sunwest's Petition to Revoke the EEOC Subpoena No. PHX-11-32 (the "Subpoena")—a petition submitted over a year prior. McLane Sunwest submits this response subject to and without waiving the responses and objections previously submitted.

In its Determination, the EEOC references only Requests 8(a)-(l), 10, 11(a), 14 and 15 and this response addresses only those Requests. By implication, the EEOC has granted Respondent's Petition to Revoke with respect to the remaining Requests, including Requests 1, 2, 3, 4, 5, 6, 7, 8(m), 9, 11(b), 12, 13, 16, 17, and 18.

I. GENERAL OBJECTIONS

McLane Sunwest objects to the Subpoena, as described more fully in previous correspondence and in its Petition to Revoke which are incorporated herein by this reference, and further objects to the Determination, as such Subpoena and Determination seek irrelevant information and exceed the EEOC's investigative authority and constitute an abuse of process.

The Subpoena and Determination are objectionable for several reasons including, but not limited to, the fact that they: (1) require Respondent to produce or create information, electronic or otherwise, in a medium or format other than that in which such information is maintained in the normal course of business and, therefore, are unduly burdensome; (2) require production and indexing of extensive electronically-stored information, the collection and production of which would seriously disrupt Respondent's normal business operations and cause significant monetary expense to Respondent that would outweigh the probative value of such information and, therefore, are unduly burdensome; (3) seek information and/or documents that are not relevant to the Charge being investigated by the EEOC or any aspect of Charging Party's employment with McLane Sunwest and/or the validity of the IPCS physical capability exam ("PCE") and, therefore, are not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related to the allegations in the Charge; (4) seek information concerning employment policies, practices, or decisions other than those at issue in the Charge and, therefore,

are not reasonably calculated to lead to the discovery of admissible evidence; (5) are not properly limited in time and seek documents beyond any statute of limitations applicable to the Charge and, therefore, are not reasonably calculated to lead to the discovery of admissible evidence; (6) require Respondent to provide information and/or documents about employees nationwide at independent facilities owned and/or operated by McLane Company, Inc. ("McLane"); (7) require documents to be provided that are not within the possession, custody or control of Respondent; and (8) require the Respondent to provide information and/or documents, including proprietary and confidential information, concerning McLane Sunwest and/or other the [sic] divisions of McLane and their employees, policies, practices, or decisions other than those at issue in the Charge.

Respondent further objects to the extent the Subpoena and Determination seek pedigree information similar to the pedigree information the EEOC sought in its ADEA investigation regarding McLane and that the United States District Court in *EEOC v. McLane Company, Inc.* (United States District Court, District of Arizona, Case No. 2:12-mc-00007-GMS) ("EEOC v. McLane Matter") found to be not "'relevant' to an investigation of [the] use of the test to make employment decisions." *See* Court's Order, page 8, lines 14-15. Respondent further objects to the extent the EEOC has requested pedigree information in the Subpoena and Determination "as a means of trolling for possible complainants. . . ." *Id.* at page 9, lines 4-5.

II. SPECIFIC RESPONSES AND OBJECTIONS TO THE EEOC'S REQUESTS

Request 8. **For January I, 2006 to the present date, provide documents or a listing of information identifying all persons who took any test or variation identified in #4 and #5 in connection with employment at any of Respondent's locations or facilities nationwide. The documents or list should be separated for each facility/location nationwide and include:**

a. **name**

b. **social security number**

c. **last known home address and telephone number**

d. **date of birth**

e. **medical condition**

f. **date of application**

g. **date of hire (or promotion), and job classification at hire (or promotion)**

h. **test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)**

i. **position held at the time test was administered (for individuals employed at the time or returning to work)**

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

Response: McLane Sunwest already has produced information relating to the IPCS testing at its facility, as well as information relating to the IPCS testing at McLane's Grocery operations. Respondent objects to the remaining portions of this virtually unlimited Request for any and all testing, even testing related to separate corporate entities, as a fishing expedition constituting an abuse of process by the EEOC. This nationwide data sought by the EEOC is unnecessary for analyzing and validating the IPCS PCE and, therefore, this Request seeks information that is not relevant. Without waiving the objections herein and those objections previously lodged, Respondent will supplement its prior submissions with additional information consistent with what the Court determined to be relevant in the EEOC v. McLane Matter. Enclosed herewith, McLane Sunwest is providing a CD identified as Exhibit 87, which includes a database of all individuals who have taken the IPCS PCE in relation to Grocery

positions nationwide through the date of the data collection. McLane Sunwest stands on its objections to the extent the Request seeks the production of personal identifiers. However, the database includes most of the other information sought in this Request, to the extent such information is available.

Request 10. **For all Respondent facilities/ locations nationwide from January 1, 2006 to the present and with respect to any test or variation identified in #4 and #5 above, provide documents or a list of information identifying all persons by name, last known home address and telephone number, and social security number, who were:**

a. **terminated because of an inability to pass any test or variation,**

b. **reassigned and/or transferred because of an inability to pass any test or variation,**

c. **not hired because of an inability to pass any test or variation,**

d. **not promoted because of an inability to pass any test or variation.**

Response: Respondent objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondent. Respondent further objects to this Request to the extent it seeks confidential information. Respondent objects to the remaining portions of this virtually unlimited Request for any and all testing, even testing related to separate corporate entities, as a fishing expedition constituting an abuse

of process by the EEOC. This nationwide data sought by the EEOC is unnecessary for analyzing and validating the IPCS PCE and, therefore, this Request seeks information that is not relevant. Without waiving the objections herein and those objections previously lodged, Respondent will supplement its prior submissions with additional information consistent with what the Court determined to be relevant in the EEOC v. McLane Matter. Enclosed herewith, McLane Sunwest is providing a CD identified as Exhibit 87, which includes a database of all individuals who have taken the IPCS PCE in relation to Grocery positions nationwide through the date of the data collection. McLane Sunwest is also in the process of analyzing PeopleSoft data to determine whether any adverse action occurred following the IPCS PCE consistent with the parameters of the Court's Order in the EEOC v. McLane Matter. This response will be supplemented once the analysis is complete.

Request 11(a). **For each person identified in 11(a) through 11(d) [sic], provide documents which reflect: date of termination, reassignment, transfer, not hired or not promoted.**

Response: Respondent objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondent. Respondent further objects to this Request to the extent it seeks confidential information. Respondent objects to the remaining portions of this virtually unlimited Request for any and all testing, even testing related to separate corporate entities, as a fishing expedition constituting an abuse

of process by the EEOC. This nationwide data sought by the EEOC is unnecessary for analyzing and validating the IPCS PCE and, therefore, this Request seeks information that is not relevant. Without waiving the objections herein and those objections previously lodged, Respondent will supplement its prior submissions with additional information consistent with what the Court determined to be relevant in the EEOC v. McLane Matter. Enclosed herewith, McLane Sunwest is providing a CD identified as Exhibit 87, which includes a database of all individuals who have taken the IPCS PCE in relation to Grocery positions nationwide through the date of the data collection. McLane Sunwest is also in the process of analyzing PeopleSoft data to determine whether any adverse action occurred following the IPCS PCE consistent with the parameters of the Court's Order in the EEOC v. McLane Matter. This response will be supplemented once the analysis is complete.

Request 14. **Provide documents or a list* of all individuals who applied for a position, for which the test identified in #4 and #5 above was in use, at any location or facility of Respondent during the relevant time period. Include:**

a. **name**

b. **social security number**

c. **last known home address and telephone number**

d. **sex**

e. medical condition

f. date of application

g. whether the applicant was hired, and date and reason for hire or non-hire

h. location at which they applied and

i. position for which they applied.

Response: Respondent objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondent. Respondent further objects to this Request to the extent it seeks confidential information, Respondent objects to the remaining portions of this virtually unlimited Request for any and all testing, even testing related to separate corporate entities, as a fishing expedition constituting an abuse of process by the EEOC. This nationwide data sought by the EEOC is unnecessary for analyzing and validating the IPCS PCE and, therefore, this Request seeks information that is not relevant. Without waiving the objections herein and those objections previously lodged, Respondent will supplement its prior submissions with additional information consistent with what the Court determined to be relevant in the EEOC v. McLane Matter. Enclosed herewith, McLane Sunwest is providing a CD identified as Exhibit 87, which includes a database of all individuals who have taken the IPCS PCE in relation to Grocery positions nationwide through the date of the data collection. McLane Sunwest is also in the process of analyzing PeopleSoft data to determine whether any adverse action occurred following the IPCS PCE consistent with the parameters

of the Court's Order in the EEOC v. McLane Matter. This response will be supplemented once the analysis is complete.

Request 15. **Provide documents or a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #4 and #5 above was in use, at any and location or facility of Respondent from January 1, 2006 to the present. Include:**

a. **name**

b. **social security number**

c. **last known home address and telephone number**

d. **sex**

e. **medical condition**

f. **date promotion sought**

g. **whether the individual seeking promotion was selected, and, if so, date and reason for selection or nonselection**

h. **location at which they sought promotion and**

i. **position for which they sought promotion,**

Response: Respondent objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondent. Respondent further objects to this Request to the extent it seeks confidential

information. Respondent objects to the remaining portions of this virtually unlimited Request for any and all testing, even testing related to separate corporate entities, as a fishing expedition constituting an abuse of process by the EEOC. This nationwide data sought by the EEOC is unnecessary for analyzing and validating the IPCS PCE and, therefore, this Request seeks information that is not relevant. Without waiving the objections herein and those objections previously lodged, Respondent will supplement its prior submissions with additional information consistent with what the Court determined to be relevant in the EEOC v. McLane Matter. Enclosed herewith, McLane Sunwest is providing a CD identified as Exhibit 87, which includes a database of all individuals who have taken the IPCS PCE in relation to Grocery positions nationwide through the date of the data collection. McLane Sunwest is also in the process of analyzing PeopleSoft data to determine whether any adverse action occurred following the IPCS PCE consistent with the parameters of the Court's Order in the EEOC v. McLane Matter, This response will be supplemented once the analysis is complete.

IV. CONCLUSION

As indicated on multiple occasions, Respondent is and has been willing to provide information to allow the EEOC to analyze the validity of the IPCS PCE. In addition to the information discussed above, McLane Sunwest obtained and is also producing notes from GMSI in relation to the job task analysis conducted for

positions within Grocery operations. See Exhibit 88. Finally, once the EEOC analyzes the information produced, McLane Sunwest is more than willing to confer as to other specific information the EEOC deems necessary to its investigation as to the IPCS PCE. As it has indicated on many occasions, McLane Sunwest's goal is to utilize a valid method for protecting the safety of its teammates.

Sincerely,

SNELL & WILMER

/s/ Joshua R. Woodard
Joshua R. Woodard

cc: Barbara Rusden (w/o enclosures)
EEOC, Investigator
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012
Barbara.Rusden@EEOC.gov

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* * *

[Doc. 9-2]

EXHIBIT 49

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September 5, 2012

Rayford O. Irvin
District Director
Phoenix District Office
Equal Employment Opportunity Commission
3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504

Re: Ochoa v. McLane Company
Charge No.: 548-2008-01093

Dear Mr. Irvin:

This letter is in follow up to your requests for information from McLane Company, Inc, ("McLane"). As you know, much of the data that the EEOC requested McLane to produce had to be collected from third-party sources. When McLane originally collected the data

from Industrial Physical Capability Services, Inc. ("IPCS"), certain duplicate entries had been eliminated to make the data more user-friendly for conducting disparate impact analysis. For example, duplicate entries for the same person taking the IPCS PCE multiple times for the same reason artificially inflated the "does not meet requirement" rates,

In our efforts to comply with the Court's order of providing the EEOC information as to whether any adverse action occurred within 90 days of the IPCS PCE event, we discovered inconsistencies in the de-duplication process. As such, McLane requested new data from IPCS with no de-duplication, Additionally, McLane conducted significant quality checking to ensure that IPCS's data matched with McLane's PeopleSoft data. After extensive analysis, we have corrected any IPCS data that was determined to be inaccurate when compared to PeopleSoft and/or manually confirmed.

Importantly, the inconsistencies in IPCS's process for de-duplication and the corrections needed after comparison with PeopleSoft data would have occurred irrespective of whether those taking the IPCS PCE were identified using social security numbers or otherwise. The EEOC's repeated assertions to the contrary are simply inaccurate. Also, in the briefing to the Court, the EEOC states that it is unable to determine duplicate IPCS events by the same individual. The EEOC need only search an employee's or applicant's identifying number (for example, Charging Party

Damiana Ochoa, MCLANE011261) and all related IPCS PCE results can be found.

Enclosed herewith as Exhibit 89 is a CD containing the updated data from IPCS with no de-duplication and after the quality checking described above.

If you have any questions, please let us know.

Very truly yours,

SNELL & WILMER, L.L.P.

/s/ Joshua R. Woodard
Joshua R. Woodard
Ashley T. Kasarjian

cc: Barbara Rusden
EEOC, Investigator
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012

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* * *

[Doc. 9-2]

EXHIBIT 50

INDUSTRIAL PHYSICAL
CAPABILITY SERVICES, INC.

AUTHORIZATION & CONSENT FORM

Industrial Physical Capability Services, Inc. (I.P.C.S.) performs physical capability assessments utilizing isokinetic equipment. Isokinetic equipment can be used

to safely determine the physical capability of an individual and relate it to the physical demands of a job. This process allows the company to match your physical capability to the physical demands of the job.

An isokinetic evaluation is different from other assessment methods. You will not be asked to lift any weights. Unlike lifting a weight or a dumbbell, isokinetic equipment measures the amount of force generated by your muscles at different speeds of movement. The machine will not resist you until you achieve the pre-selected speed. You must push and pull as hard and fast as you can throughout the entire motion on every repetition. If you feel pain at any point during the evaluation, you may reduce your effort and the machine will automatically reduce its resistance.

You will be asked to perform certain movements using shoulder, knee, and/or trunk muscles. Other muscle groups may also be evaluated.

TO ACHIEVE ACCURATE RESULTS, *it is very important that you understand the following points*:

- **This evaluation assesses the maximum physical capability of your major muscle groups.**
- **You are expected to give your best effort on each repetition.**
- **You must perform MOVEMENTS REQUIRING MAXIMUM EFFORT for short time periods.**

- **You must PUSH and PULL the machine AS FAST and AS HARD as you can, within the limits of your physical capability.**

NOTE: You may experience some minor muscle discomfort *from the effort of exercise* during and following the evaluation. This is normal. However, if you experience an intolerable level of discomfort, reduce the pressure you are exerting so that the discomfort subsides, or discontinue the effort entirely.

_____

Client initials

I understand that I am to notify the technician administering the assessment of any prior/current injuries that I have experienced, particularly to the shoulder, knee, or trunk muscles. (Include strains, sprains, breaks, surgery, or other related abnormalities.)

I also understand that I should notify the technician administering the assessment if I am experiencing intolerable levels of discomfort while performing the assessment.

I understand that I should notify the technician administering the assessment if I am taking any prescribed or over-the-counter medication.

I understand that I should notify the technician administering the assessment if I have diabetes, high blood pressure or other health-related concerns.

I understand that if I am a female and pregnant that I should notify the technician administering the assessment.

I have read and understand the above information and I understand that I will be asked to give maximum, all-out effort ***within the limits of my ability****, and that I will be performing short periods of strenuous exercise. I understand that I am not expected to work through discomfort that I can not tolerate.* *

_____ _____

Signature of Client **Date**

**To the best of my knowledge, I feel that I can complete all parts of the physical capability evaluation, so I do hereby authorize _____ to perform the tests described and consent to participate in the evaluations.*

_____ _____

Signature of Client **Date**

The undersigned affirms that I have read, asked about, and received satisfactory explanation of any part of this document that I did not understand.

_____ _____

Signature of Client **Date**

I have witnessed the client reading and signing the information above, and I have answered the questions he or she has asked me.

_____ _____

Signature of Technician **Date**

* * *

[Doc. 9-2]

EXHIBIT 52

IPCS GUIDELINES FOR PHYSICAL CAPABILITY ASSESSMENT

Dear Candidate:

You have been scheduled for a **physical capability assessment** at the listed location. Your appointment is **on** _____, **at** ___ **AM/PM**. The assessment session will typically last under 45 minutes. **Please** carefully **read** the following **instructions**. If needed, you may contact the listed provider. We **ask 24 hours notice** should you need to **cancel** or **reschedule** your appointment.

Clinic Name: Telephone:

Address: Contact:

Job Applying for: _____

GUIDELINES:

1. **MUST** eat or drink a carbohydrate based **light meal** or beverage **within 2 hours** of the assessment session. Fruit, candy, or juice is acceptable.
2. **DO NOT** smoke 2-4 hours prior to your appointment.
3. **Refrain** from excessive caffeine or recreational alcohol use prior to the session. Added **water intake** is preferred.
4. Dress in sweat clothes/ casual exercise attire. **Tight fitting** street clothes **can limit** your true performance and cause discomfort.
5. As possible, **avoid intense exercise or lack of rest** 24 hours prior to the assessment session.
6. **Be aware** that an acute and/or aggravated injury, symptoms of severe illness, or pregnancy may require that the assessment be postponed.

WHAT IT IS.....SAFE!!!!

Your knee and shoulder muscles will be tested on state-of-the-art isokinetic equipment, identical to the type used for performance assessment of **pro-athletes!!!** The force producing capabilities of your muscles will be measured, not absolute strength. As you initiate movement on the speed controlled lever arm, the equipment resists your effort; therefore, this assessment is **not like** lifting weights. While performing the exercise movements, you will be stabilized and under the direct supervision of a trained clinician. Each assessment exercise lasts only 15-20 seconds per

set. **You will be required to give maximum** effort during each set for accurate measurement of your true physical capability. For **ultimate safety** the equipment will accommodate to your fatigue by **immediately** reducing the resistance as your effort declines thus **limiting** the possibility of overexertion. As with any exercise normal muscle soreness may occur within 48 hours. If you experience prolonged soreness and/or pain, contact your physician. Further instruction will be given the day of your assessment.

Dear Client:

You have been scheduled for a **physical capability assessment** at the listed location.

Your appointment is **on** _____, **at** ___ **AM/PM**. The assessment session will typically last under 45 minutes. **Please** carefully **read** the following **instructions**. If needed, you may contact the listed provider. We ask **24 hours notice** should you need to **cancel** or **reschedule** your appointment.

Clinic Name: Valley Rehab **Telephone:** (623) 932-9008

Address: 1072 S. Litchfield Rd. Goodyear, AZ. 85338

Job Applying for: _____

GUIDELINES:

1. **MUST** eat or drink a carbohydrate based **light meal** or beverage **within 2 hours** of the assessment session. Fruit, candy, or juice is acceptable.
2. **DO NOT** smoke 2-4 hours prior to your appointment.

3. **Refrain** from excessive caffeine or recreational alcohol use prior to the session. Added **water intake** is preferred.

4. Dress in sweat clothes/casual exercise attire. **Tight fitting** street clothes **can limit** your true performance and cause discomfort.

5. As possible, **avoid intense exercise or lack of rest** 24 hours prior to the assessment session.

6. **Be aware** that an acute and/or aggravated injury, symptoms of severe illness, or pregnancy may require that the assessment be postponed.

WHAT IT IS.....SAFE!!!!

Your knee and shoulder muscles will be tested on state-of-the-art isokinetic equipment, identical to the type used for performance assessment of **pro-athletes!!!** The force producing capabilities of your muscles will be measured, not absolute strength. As you initiate movement on the speed controlled lever arm, the equipment resists your effort; therefore, this assessment is **not like** lifting weights. While performing the exercise movements, you will be stabilized and under the direct supervision of a trained clinician. Each assessment exercise lasts only 15-20 seconds per set. **You will be required to give maximum** effort during each set for accurate measurement of your true physical capability. For **ultimate safety** the equipment will accommodate to your fatigue by **immediately** reducing the resistance as your effort declines thus **limiting** the possibility of overexertion. As with any exercise normal muscle soreness may occur within

48 hours. If you experience prolonged soreness and/or pain, contact your physician. Further instruction will be given the day of your assessment.

8/2/2007

GUIDELINES FOR PHYSICAL CAPABILITY ASSESSMENT

Dear Client

You have been scheduled for a **physical capability assessment** at the listed location.

Your appointment is **on** _____, **at** ____ **AM/PM.** The assessment session will typically last under 45 minutes. **Please** carefully **read** the following **instructions**: If needed, you may contact the listed provider. We ask **24 hours notice** should you need to **cancel** or **reschedule** your appointment.

Clinic Name: Valley Rehab **Telephone:** (623) 974-1797

Address: 13460 N 94th Dr., Suite G-1, Medical Center #2, Peoria, AZ 85381

Job Applying for: _____

GUIDELINES:

1. **MUST** eat or drink a carbohydrate based **light meal** or beverage **within 2 hours** of the assessment session. Fruit, candy, or juice is acceptable.
2. **DO NOT** smoke 2-4 hours prior to your appointment.

3. **Refrain** from excessive caffeine or recreational alcohol use prior to the session. Added **water intake** is preferred.

4. Dress in sweat clothes/casual exercise attire. **Tight fitting** street clothes **can limit** your true performance and cause discomfort.

5. As possible, **avoid intense exercise or lack of rest** 24 hours prior to the assessment session.

6. **Be aware** that an acute and/or aggravated injury, symptoms of severe illness, or pregnancy may require that the assessment be postponed.

WHAT IT IS.....SAFE!!!!

Your knee and shoulder muscles will be tested on state-of-the-art isokinetic equipment, identical to the type used for performance assessment of **pro-athletes!!!** The force producing capabilities of your muscles will be measured, not absolute strength. As you initiate movement on the speed controlled lever arm, the equipment resists your effort; therefore, this assessment is **not like** lifting weights. While performing the exercise movements, you will be stabilized and under the direct supervision of a trained clinician. Each assessment exercise lasts only 15-23 seconds per set. **You will be required to give maximum** effort during each set for accurate measurement of your true physical capability. For **ultimate safety** the equipment will accommodate to your fatigue by **immediately** reducing the resistance as your effort declines thus **limiting** the possibility of overexertion. As with any exercise normal muscle soreness may occur within

48 hours. If you experience prolonged soreness and/or pain, contact your physician. Further instruction will be given the day of your assessment.

8/2/2007

[Doc. 9-3]

EXHIBIT B

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Attorneys for Respondent
McLane Company, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc., Respondent.	Case No. 2:12-mc-00007-GMS **DECLARATION OF SUZANNE H. STENSON IN SUPPORT OF RESPONDENT MCLANE COMPANY, INC.'S RESPONSE TO PETITIONER'S APPLICATION FOR ORDER TO SHOW CAUSE WHY ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

DECLARATION OF SUZANNE H. STENSON

1. I, SUZANNE H. STENSON, declare as follows:

2. I have personal knowledge of the facts and matters set forth in this declaration and could and would testify competently and truthfully to the same if called as a witness and placed under oath. I am over 18 years of age.

3. I make this declaration in support of Respondent McLane Company, Inc.'s ("McLane") Response to Petitioners Application for Order to Show Cause why Administrative Subpoena Should Not be Enforced (the EEOC's Motion").

4. I am the Associate General Counsel for Respondent McLane Company, Inc. I have held this position since July 23, 2007. As the Associate General Counsel, I oversee and handle all employment-related legal issues for McLane and its related entities. I am the primary McLane attorney responsible for responding to charges and investigations by the EEOC, including the Subpoena at issue in the above-captioned matter.

5. On behalf of McLane, I retained Morgan, Lewis & Bockius, L.L.P. to represent the Company in relation to the EEOC's purported investigation of compliance under the Age Discrimination in Employment Act ("ADEA"). I have personally managed the defense and approved of all submissions to the EEOC. Based on my personal involvement, I have knowledge of the course of events described herein.

6. Prior to the ADEA subpoena at issue herein, McLane/Suneast, Inc., doing business in Goodyear, Arizona as McLane Sunwest ("McLane Sunwest"), received notice that the Phoenix office of the EEOC was investigating an individual charge of discrimination filed by Damiana Ochoa ("Ochoa") (the "Ochoa Charge") alleging sex and disability discrimination. On behalf of McLane Sunwest, I retained Snell & Wilmer L.L.P. to represent the company in relation to the Ochoa Charge. I have personally monitored and managed the defense of the Ochoa Charge and approved of all submissions to the EEOC. Based on my personal involvement, I have personal knowledge of the course of events described herein relating to the Ochoa Charge.

A. The EEOC's investigation of Ochoa's charge of gender/pregnancy and disability discrimination.

7. In early 2008, I received a copy of the Ochoa Charge against McLane Sunwest. In her charge of sex and disability discrimination, Ochoa alleges as follows:

> On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (physical capability strength test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007, and December 28, 2007, I retested and did not pass. I have worked for the above-named employer for over eight years as a cigarette selector.
>
> I believe I have been discriminated against because of my sex, female, (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> The physical capability strength test is given to all employees returning to work from medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended.

A true and correct copy of the Ochoa Charge is attached as **Exhibit 1**. McLane Sunwest denies Ochoa's

allegations of discrimination in their entirety and provided EEOC Investigator Barbara Rusden ("Rusden") with evidence showing that Ochoa had been treated in accordance with the policy at McLane Sunwest that all newly hired employees, as well as all employees away from their jobs for more than 30 days, must take the IPCS PCE[1] to ensure they are qualified (have the strength capability) to safely perform the essential functions of any position identified as physically demanding.[2] The IPCS PCE is an objective isokinetic evaluation provided, analyzed, and validated by third parties, and the policy applies to all employees returning from leave of more than 30 days regardless of the reason for the leave.

8. McLane Sunwest cooperated with Rusden's investigation of Ochoa's Charge, including submitting a position statement and responding to several additional information requests. McLane Sunwest also permitted representatives of the Phoenix EEOC office to conduct an on-site visit of its facility, and agreed to the interview of Theresa Hatch, McLane Sunwest's Human Resources Manager, and Janann Williams, McLane's Vice President, People.

9. Beginning in 2009, however, representatives of the Phoenix EEOC office have sought information

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[1] IPCS PCE refers to a physical capability exam ("PCE") conducted by third-party health care providers and interpreted by Industrial Physical Capability Services, Inc. ("IPCS").

[2] These positions, or exemplar positions, were analyzed by third-party ergonomic experts of a company called General Management Solutions, Inc. ("GMSI").

well beyond Ochoa's allegations. A true and correct copy of a letter dated August 24, 2009 from Rusden requesting information regarding the Ochoa Charge is attached as **Exhibit 2**. Although Ochoa alleged only gender and disability discrimination relating to her attempt to return to work at McLane Sunwest, Rusden sought broad nationwide information regarding all facilities, and regarding age—none of which was alleged by Ochoa.[3] (In fact, according to her EEOC Charge, Ochoa is under the age of 40 and she only worked for McLane Sunwest, a Grocery facility.)[4] Rusden also sought job descriptions for every position at McLane and sought a database of information for any individual employed by McLane since 2006—regardless of whether IPCS PCE was required for their position.[5] As such, through counsel, McLane Sunwest responded, limiting the information provided to the scope of Ochoa's Charge. A true and correct copy of the response letter dated November 13, 2009 is attached as **Exhibit 3**.

B. <u>The EEOC "expands" its investigation of Ochoa's Charge.</u>

10. In response to the limited response to the requests because they exceeded the scope of the Ochoa

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[3] See requests for information 5 and 12 seeking dates of birth.

[4] See Exhibit 1.

[5] See requests for information 6 and 12.

Charge, McLane received a letter from District Director Rayford O. Irvin ("Irvin") stating that the EEOC was investigating Ochoa's Charge, in conjunction with McLane's nationwide "ADEA compliance"—and requesting the same nationwide data previously sought under the Ochoa Charge. A true and correct copy of Irvin's letter and accompanying request for information is attached as **Exhibit 4**. As indicated on page 1 of the request for information, Irvin simply added an additional charge number above the Ochoa Charge number. Surprisingly, Irvin also asked for a copy of any liability insurance that would provide coverage for "the claims asserted in these charges."[6]

11. In a letter from its counsel dated September 3, 2010, McLane made clear that it was willing to cooperate with any reasonable investigation conducted by the EEOC, but pointed out that the EEOC never provided McLane a copy of the purported new charge or any other notice of the purported ADEA allegations warranting an expanded nationwide investigation of ADEA compliance. McLane also raised concerns with the intermingling of this new ADEA charge and Ochoa's Charge and the timing coming on the heels of objections to the investigation exceeding the scope authorized by Title VII and the ADA. McLane asked the EEOC for an explanation of the basis for investigating nationwide ADEA compliance, including providing a copy of the purported ADEA charge referenced. A true and correct copy of the letter is attached as **Exhibit 5**.

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[6] See request number 3.

12. In a letter from its counsel dated September 3, 2010, McLane Sunwest similarly made clear that it was willing to cooperate with any reasonable investigation conducted by the EEOC, but pointed out that Ochoa only alleged sex and pregnancy discrimination, not age discrimination, and that she was under forty and not covered by the ADEA—providing no support for an age investigation in relation to her charge. A true and correct copy of the letter is attached as **Exhibit 6**.

13. Rusden responded to McLane's counsel that the EEOC may initiate an ADEA investigation at any time and that the EEOC would split the two "charges" and send separate information requests. The EEOC refused to provide McLane with a copy of the purported ADEA charge (identified as Charge No. 540-2010-01761) or any other notice of the purported ADEA allegations or issues warranting a nationwide "compliance" investigation. A true and correct copy of Rusden's letter dated November 8, 2010 is attached as **Exhibit 7**.

14. Rusden also apologized for "intermingling" the Ochoa Charge and the EEOC's purportedly separate investigation of ADEA compliance and sent a separate, but virtually identical, request relating to the Ochoa Charge. A true and correct copy of Rusden's letter dated November 9, 2010 is attached as **Exhibit 8**. (Compare Exhibit 7 and Exhibit 8).

15. On December 7, 2010, through counsel, McLane again wrote the EEOC expressing its willingness to cooperate, but seeking clarification as to the EEOC's significant request for information regarding McLane's nationwide employment practices and its ADEA compliance. A true and correct copy of the letter is attached as **Exhibit 9**.

16. On December 11, 2010, counsel for McLane again wrote to the EEOC offering to cooperate and suggesting an alternative, less burdensome production focusing initially on the validity of the IPCS PCE. A true and correct copy of the letter is attached as **Exhibit 10**.

17. On January 12, 2011, Rusden responded to messages and contacted counsel for McLane by telephone. Upon information and belief, it is my understanding that Rusden stated that the new EEOC ADEA "charge" was "just a number" added to the ongoing Title VII investigation and that there is no actual charge of age discrimination, no charging party, and no commissioner's charge. Rather, upon further information and belief, the Phoenix office of the EEOC had decided to expand the Ochoa investigation into an ADEA investigation of McLane Company, encompassing all related entities nationwide—even distinct, separate corporations. Moreover, although asked, Rusden stated that the EEOC was not willing to explain the basis for this Phoenix EEOC-initiated investigation or why it was warranted or justified—particularly given that no age-related information had been provided to the EEOC on which it could even have a suspicion of

an issue with ADEA compliance—or why the EEOC was seeking the same information requested in the Ochoa investigation as part of this purported compliance review. Upon information and belief, Rusden further commented that the EEOC was looking for "victims." This conversation was documented and confirmed in a follow-up letter from McLane's counsel. A true and correct copy of the letter is attached as **Exhibit 11**.

C. McLane Proposed Less Burdensome Alternative Production.

18. On January 19, 2011, counsel for McLane again wrote to the EEOC at my direction. A true and correct copy of the letter is attached as **Exhibit 12**. McLane explained that the commingling of the requests and the circumstances under which the new charge arose gave the appearance of an effort to evade the statutory limitations on the EEOC in its investigation of Ms. Ochoa's Charge. Although it had significant questions as to the legitimacy of this new "charge number," and objected to the far reaching and overly broad requests for information relating thereto, McLane made clear that it would continue to cooperate with legitimate requests. McLane suggested having a more frank discussion of the EEOC's concerns, explaining that its goal was to better understand the EEOC's inquiry and to determine whether a more manageable compilation of data would be sufficient to allay any legitimately raised concerns the EEOC may have had, McLane suggested an initial focus on the validity and

legitimacy of the IPCS PCE because such an inquiry could obviate any need to add new statutes to any investigation and possibly avoid the EEOC's unduly burdensome requests. As McLane noted, if the IPCS PCE is valid, much of the burden of compiling the information sought by the EEOC would be unnecessary.

19. Instead of engaging in any discussion as McLane requested, Irvin issued almost identical subpoenas purportedly relating to the ADEA investigation and relating to the Ochoa Title VII and ADA charge. A true and correct copy of the ADEA Subpoena is attached as **Exhibit 13**. A true and correct copy Ochoa Subpoena is attached as **Exhibit 14**.

20. On February 22, 2011, McLane Sunwest petitioned the EEOC to revoke the subpoena issued in relation to the Ochoa Charge. A true and correct copy of the petition to revoke the Ochoa subpoena is attached as **Exhibit 15**. The EEOC has not moved to enforce the Ochoa subpoena.

D. <u>While Maintaining Its Objections, McLane Has Provided Significant Information In Response To The Subpoena.</u>

21. The EEOC has never offered any explanation or justification for its purported ADEA nationwide investigation. The only information McLane has been given in its efforts to engage the EEOC in discussions relating to the basis for the EEOC's ADEA investigation was Investigator Rusden's comment to counsel for

McLane that the EEOC was "looking for victims"—even before it received *any* age-related information,

22. Given the circumstances, McLane petitioned the EEOC for the revocation of the Subpoena or other such administrative reconsideration or withdrawal. A true and correct copy of the petition is attached as **Exhibit 16**. In its Petition and despite its concern that the EEOC was improperly using its ADEA authority to subvert its more limited Title VII authority, McLane still showed cooperation and asked the EEOC to consider some preliminary data—without waiver of either party's position as to the legitimacy of the investigation or as to the full scope of the Subpoena. McLane again offered to produce data establishing the validity of the IPCS test.

23. The Phoenix EEOC never responded to the substantive arguments in the petition to revoke the Subpoena at issue herein. Rather, Irvin simply threatened immediate enforcement action if McLane intended not to comply with the Subpoena. A true and correct copy of Irvin's letter is attached as **Exhibit 17**.

24. Notwithstanding its concerns and without waiving its objections, McLane submitted a supplemental response to the Subpoena that included a substantial amount of information and documents. A true and correct copy of the supplemental response to the Subpoena is attached as **Exhibit 18**. Included with its response, McLane produced relevant information regarding all individuals who have participated in the

IPCS PCE in relation to Grocery jobs at all Grocery facilities nationwide. This information included identification numbers for each person taking the IPCS PCE, location where they worked, age as of the date of the test, reason for taking the test, position sought, physical capability level achieved, and whether the physical capability achieved met the minimum requirement for the particular position, among other things. McLane also produced validation studies showing the reduction of workplace injuries since the implementation of the IPCS PCE, among many other things.

25. On March 25, 2011, Irvin issued two additional identical subpoenas, one to McLane Sunwest purportedly under Title VII (attached as **Exhibit 19**) and one to McLane purportedly under the ADEA (attached as **Exhibit 20**). Both subpoenas requested testimony regarding the implementation of the IPCS PCE at the separate corporation McLane Foodservice, Inc. ("Foodservice"). As previously noted, McLane had already provided the EEOC the opportunity to interview Janann Williams regarding the decision to implement the IPCS PCE at McLane Sunwest (where Ochoa worked) and the other Grocery facilities.

26. By letter dated April 8, 2011, counsel for McLane objected to the subpoena seeking testimony relating to a separate corporate entity and using the purported ADEA investigation to exceed the scope of its authority under the Title VII investigation of the Ochoa Charge. A true and correct copy of the letter is attached as **Exhibit 21**. McLane further asked the EEOC for the opportunity to discuss the validity of the

IPCS PCE and the lack of adverse disparate impact and, given such, whether the EEOC deemed any additional data necessary for it to complete its investigation. McLane emphasized to the EEOC that if it had concerns with the IPCS PCE, or suggestions as to the use of the IPCS PCE, the company genuinely wanted to hear them. McLane's primary goal has always been to employ people who are qualified to safely perform the essential functions of these physically demanding positions.

27. In response, the EEOC finally agreed to meet with McLane for discussion. Because I hoped the EEOC was equally committed to substantive discussions, I personally flew to Arizona, as did McLane's counsel from Morgan Lewis, to attend the meeting offered by EEOC representatives which occurred on August 25, 2011. Unfortunately, despite our good faith efforts and expense, the representatives of the Phoenix EEOC refused to engage in any substantive discussions regarding the merits of the IPCS PCE or the lack of ADEA disparate impact. The EEOC also refused to substantively confer as to the Subpoenas and the relevance of the information. sought. Rather, the meeting was nothing more than a one-sided questioning by the Phoenix EEOC representatives of whether and to what extent McLane would further capitulate to the requests in the Subpoenas.[7]

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[7] McLane Sunwest representatives, including myself and counsel from Snell & Wilmer, and EEOC representatives also met

28. In an effort to further cooperate with the EEOC, McLane submitted supplemental responses with additional information and additional document production on December 6 and again on December 22, 2011. True and correct copies of the letters are attached as **Exhibits 22 and 23**. McLane provided further supplemental information on January 31, 2012, and is continuing to review and provide information as available. A true and correct copy of the letter is attached as **Exhibit 24**. The Phoenix EEOC responded with initiating this lawsuit to enforce the Subpoena Irvin issued.

29. By letter dated January 11, 2012, Irvin notified McLane that the Phoenix EEOC had decided to "re-open" a charge that had been filed by Sunny A. Abraham on October 30, 2009 (the "Abraham Charge"). A true and correct copy of the letter is attached as **Exhibit 25**. I am familiar with the circumstances surrounding the Abraham Charge as I similarly managed the response to the charge as counsel for McLane. A true and correct copy of the Abraham Charge is attached as **Exhibit 26**. Abraham had alleged disability discrimination under the ADA and race discrimination under Title VII. The Abraham Charge had been investigated by Rusden and dismissed with no finding of reasonable cause by Irvin in September 2010—all while the Ochoa charge was pending. A true and correct copy of the EEOC's dismissal of the Abraham

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on August 24, 2011, to discuss the Ochoa Charge and the subpoena Irvin issued relating thereto. The meeting relating to the Ochoa Charge was equally one-sided and non-productive.

Charge is attached as **Exhibit 27**. The Abraham Charge had nothing to do with the IPCS PCE, contained no allegation of age discrimination, and was invalid on its face as it was filed well beyond the statutory 300-day deadline for filing EEOC charges.[8] To McLane's knowledge, Irvin reopened the Abraham Charge with no new evidence or intervening act warranting further investigation of Abraham's allegations.

30. The day after Irvin's letter regarding the Abraham Charge, Irvin sent another letter notifying McLane that the Phoenix EEOC was reopening another charge—from Minnesota—filed by Jorge Evasku on June 14, 2010 ("Evasku Charge"). A true and correct copy of the letter is attached as **Exhibit 28**. I am familiar with the circumstances surrounding the Evasku Charge as I similarly managed the response to the charge as counsel for McLane. A true and correct copy of the Evasku Charge is attached as **Exhibit 29**. The Evasku Charge was filed with and investigated by the Minnesota Department of Human Rights (MDHR"). Evasku had alleged disability discrimination under the ADA. The Evasku Charge had nothing to do with the IPCS PCE and contained no allegation of age discrimination.[9] Through the MDHR's mediation program, the Evasku Charge had previously been

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[8] Abraham's Charge states on its face that his employment was terminated on October 14, 2008; yet he did not file the Charge until October 30, 2009.

[9] In fact, Evasku admits that following his leave, he took the IPCS PCE and achieved the physical capability needed to meet the minimum requirements for his position, and was returned to work. *See* Exhibit 29.

resolved by mutual agreement, with the MDHR stating: "This case has been dismissed with prejudice and the Department's case has been closed as satisfactorily adjusted." A true and correct copy of the letter is attached as Exhibit 30. To McLane's knowledge, Irvin similarly re-opened this Minnesota Charge with no evidence or intervening act warranting further investigation.

31. On January 19, 2012, Irvin issued another subpoena virtually identical to the one before this Court, to McLane Foodservice, Inc. Again, the Phoenix EEOC proclaims to be independently investigating "ADEA compliance" under its own authority. A true and correct copy of the letter and subpoena to McLane Foodservice is attached as **Exhibit 31**. As before, the Phoenix EEOC seeks nationwide contact information for current and former employees and applicants of McLane Foodservice. As before, the Phoenix EEOC offers no basis for this purported charge against a separate corporate entity.

32. On February 6, 2012, Irvin issued two more identical subpoenas: one purportedly pursuant to Title VII and the ADA, and the other purportedly pursuant to the ADEA. True and correct copies of the letters are attached as **Exhibits 32 and 33**.

33. On February 13, 2012, McLane Sunwest responded to the February 6 Subpoena issued under Title VII and the ADA with a petition to revoke in which it agreed to respond to most of the requests, but objected to and sought modification of certain requests

contained therein. A true and correct copy of the McLane Sunwest's petition to revoke the February 6 subpoena is attached as **Exhibit 34**. McLane's deadline to respond to the February 6 ADEA subpoena is February 22, 2012.

34. In addition, several McLane Sunwest teammates have noted that they received letters from the [sic] Rusden. Attached as **Exhibit 35** is a true and correct copy of a letter provided to us by teammate Lydia Romero. I was also notified that Rusden attempted to contact a management level employee. Finally, another McLane/Suneast, Inc. teammate in northern California informed me that Rusden called her and was very insistent that she provide the name and phone number for a friend of hers that is a former teammate of McLane Suneast/Inc.. Rusden informed this teammate that the information was necessary because she was investigating pregnancy discrimination relating to the PCE.

35. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 17, 2012, at Temple, Texas.

/s/ Suzanne H. Stenson
SUZANNE H. STENSON

* * *

[Doc. 9.4]

EXHIBIT 8

[SEAL] **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
Phoenix District Office

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
(602) 640-5000
TTY (602) 640-5072
FAX (602) 640-5071

November 9, 2010

Ashley T. Kasarjian
Snell & Wilmer
400 East Van Buren Street
Suite 1900
Phoenix, AZ 85004-2202

RE: Charge No. 540-2008-01093
Ochoa v. McLane Sunwest

Dear Ms. Kasarjian:

This is in response to your letter dated September 3, 2010. Please accept my apologies for any confusion caused by the intermingling of two separate charges in the Equal Employment Opportunity Commission's (Commission) Request for Information mailed to Bobby Carlson, President of McLane Sunwest, on August 6, 2010.

This is to also notify you that the Commission has made a decision to broaden the scope of its investigation for the above-referenced charge to all McLane facilities/locations nationwide.

The enclosed Request for Information corrects and replaces the Request for Information mailed to Mr. Carlson on August 6, 2010. Your response to the enclosed Request for Information is due **on or before December 1, 2010**.

Should you have any questions regarding this request, I can be reached at (602) 640-5054.

Sincerely,

/s/ Barbara Rusden
Barbara Rusden
Investigator

cc: Joshua R. Woodard

REQUEST FOR INFORMATION
Ochoa v. McLane Sunwest
Charge No. 540-2008-01093

Relevant time period: January 1, 2006 to present date

Respondent: McLane Company, Inc. (all facilities/ locations nationwide including corporate)

1. Submit the name, title, address and telephone number of the person to whom further inquiries regarding this charge should be directed.

2. Provide the correct legal name and business address of the Respondent named in the charge and describe the nature of Respondent's business, Include any and all trade names, d/b/a's, or former names. Also include documentation either already in existence or prepared by Respondent in response to this request that describes or provides the following information:

   a. the type of corporate or business entity

   b. approximate number of employees during calendar years 2007 and 2008

   c. location of corporate headquarters

   d. current status of the corporation, i.e. active, inactive, or another status

   e. the name of Respondent's corporate officers, directors, and owners

   f. the statutory agent for Respondent in Arizona

   g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

      i. Provide the legal name and business address of all superior and subordinate business entities identified.

      ii. Provide the statutory agent for all superior and subordinate business entities identified.

3. Does the Respondent have a policy of liability insurance that will provide coverage for the claims

asserted in this charge? If so, please provide a copy of the policy.

4. Submit a copy of any employee handbook in effect during the relevant time period and

   a. explain in detail how this information is disseminated to employees, and

   b. provide the date when any employee handbook went into effect, and the dates of any revisions.

5. List each test used by Respondent during the relevant time period, including but not limited to Industrial Physical Capability Strength test (IPCS) and Isokinetic Physical Capability Test (IPCT), and list any variations of each test in use.

   a. For each test variation listed, identify all jobs or job classifications for which it has been used.

6. For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #5 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:

   a. describe how the test was developed and how it is used by Respondent,

   b. provide the name of each test's or variation's author or creator; the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

c. describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the process. Include all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include any and all documents reviewed by any key decision makers in addition to paragraph 7 below,

d. specify the effective dates of use of each test or variation at each of Respondent's locations,

e. provide any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for individual(s) who administer the test and individual(s) who take the test,

f. provide a description of how each test or variation is administered and scored. Include a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

g. provide a list of all jobs and job classifications for which any test or variation is used;

h. for each job or job classification for which a test or variation is used, identify the specific test

or variation (listed in response to paragraph 5) used for that job or job classification,

i. for each job or job classification for which a test or variation is used, identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide details on the process by which any scoring/classification system was established, and provide details about the process by which Respondent determined the minimum score considered "passing."

j. for each job or job classification for which a test or variation is used, provide job descriptions.

k. provide copies of any and all adverse impact studies performed for each test or variation.

7. Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #5 and #6 above, to include any notes or other documents concerning development and implementation of the test by Respondent.

8. For all positions at Respondent's facilities/ locations nationwide for which any test or variation identified in #5 and #6 above is used, provide the Job Task Analysis for each position. Include:

a. a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and

b. any documents containing job analysis information for all positions wherein testing is applied to employees and/or new hires.

9. For the relevant time period, provide documents or a listing* of information identifying all persons who took any test or variation identified in #5 and #6 in connection with employment at any of Respondent's locations or facilities nationwide. Provide a separate list for each facility/location nationwide and annotate the list by:

   a. name

   b. social security number

   c. last known home address and telephone number

   d. sex

   e. medical condition

   f. date of application

   g. date of hire (or promotion), and job classification at hire (or promotion)

   h. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

i. position held at the time test was administered (for individuals employed at the time or returning to work)

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

10. Provide a list of all Respondent's facilities and locations in existence during the relevant time period.

11. For all Respondent facilities/locations nationwide during the relevant time period and with respect to any test or variation identified in #5 and #6 above, provide documents or a list* of information identifying all persons by name, last known home address and telephone number, and social security number, who were:

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

a. terminated because of an inability to pass any test or variation,

b. reassigned and/or transferred because of an inability to pass any test or variation,

c. not hired because of an inability to pass any test or variation,

d. not promoted because of an inability to pass any test or variation,

12. For each person identified in 11(a) through 11(d), provide:

a. date of termination, reassignment, transfer, not hired or not promoted,

b. name and title of the individual who made the decision to terminate, reassign, transfer, not hire and/or not promote the person based on test results.

13. For each test or variation identified in #5 or #6, provide any and all evidence which shows any change, whether a reduction or increase, in workplace injuries.

14. During the relevant time period, if Respondent received any formal or informal complaints by any employee other than Charging Party concerning the test(s), or any claims of discrimination based on sex and/or disability, submit the following:

a. name and job title of each person who complained,

b. name and job title of each person receiving each complaint,

c. date of each complaint,

d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken.

15. Provide a list* of all individuals who applied for a position, for which the test identified in #5 and #6 above was in use, at any location or facility of Respondent during the relevant time period. Annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of application

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

g. whether the applicant was hired, and date and reason for hire or non-hire

h. location at which they applied and

i. position for which they applied.

16. Provide a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #5 and #6 above was in use, at any and [sic] location or facility of Respondent during the relevant time period. Annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date promotion sought

g. whether the individual seeking promotion was selected, and, if so, date and reason for selection or non-selection

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

h. location at which they sought promotion and

i. position for which they sought promotion.

17. Provide a list* of all individuals who were employed by Respondent at any location or facility nationwide during the relevant time period. Provide a separate list for each facility/location nationwide and annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of hire

g. all position titles held

h. dates when each position title was held

i. termination date and reason, if applicable.

18. Provide a complete copy of Charging Party's personnel file, including but not limited to all documents relating to applications for employment,

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by her, complaints made about her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination and Charging Party's medical file, including but not limited to test scores or results, documentation from treating physicians, documentation from non-treating physicians, and medical or physical evaluations by Respondent's personnel.

19. Provide complete copies of the personnel files, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by him or her, complaints made about him or her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination for Bobby Carlson (President), Theresa Hatch (Human Resources Manager) and Janann Williams (Vice President, People)

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* * *

[Doc. 9-5]

EXHIBIT 18

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March 9, 2011

VIC CM RRR AND
FAX 1 602 640 5071

Rayford O. Irvin
District Director
Phoenix District Office
Equal Employment Opportunity Commission
3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504

Re: EEOC v. McLane Company
Charge No.: 540-2010-01761
Supplemental Response to Subpoena
No. PHX-11-33 ("Subpoena")

Dear Mr. Irvin:

As discussed more fully in its Petition to Revoke the above-referenced Subpoena, McLane Company, Inc. ("McLane") has legitimate concerns with the Subpoena given the circumstances and given the breadth of information sought. Notwithstanding its concerns,

McLane has consistently expressed a willingness to cooperate with the EEOC and has made efforts to confer with EEOC officials to facilitate the EEOC's investigation, while minimizing the burden of production. McLane has offered to provide the EEOC with targeted data in an attempt to alleviate its concerns through less burdensome and more focused means. McLane remains committed to engaging in such discussions and cooperating with the EEOC—without waiving its objections to the EEOC's investigation and information requests.

Without waiving its general and specific objections previously submitted in its Petition for Revocation, which are hereby incorporated herein by reference, McLane provides the following supplemental response to the Subpoena.

As previously explained, McLane has been left in the dark as to the EEOC's self-initiated investigation. In fact, the only information McLane has been given as to the basis for the EEOC's investigation is Investigator Rusden's comment that the EEOC is "looking for victims"—inferring that the EEOC has already decided (without having received any age-related information) that discrimination is occurring and individuals over 40 have been "victimized."

To the contrary, we have analyzed data relating to all individuals who have taken the IPCS exam for grocery positions and it clearly reveals that the IPCS exam does not disparately impact individuals over 40. With regard to all grocery operations, 3,019 individuals over

the age of 40 and 9,072 under the age of 40 participated in the IPCS exam. Approximately 77% of those over the age of 40 met the minimum requirements for the position. Similarly, approximately 85% of those under 40 met the minimum requirements.

Pursuant to the requests below, McLane is producing relevant information regarding all individuals who have participated in the IPCS exam in relation to grocery jobs. (*See* enclosed CD).[1] McLane is also producing validation studies showing the reduction of workplace injuries as a result of the IPCS exam. Finally, McLane is working on compiling and analyzing further injury data and expects to have that to the EEOC in the near future once it can be gathered and collated.

Although it continues to object to certain requests, McLane believes the information it is providing should dispel any concerns the EEOC may have. To the extent additional data is deemed necessary for the EEOC to complete its investigation, we would appreciate the opportunity to confer as to an appropriate scope of any such information. Finally, McLane remains willing to discuss the validity of the IPCS exam as its sole desire is to utilize an appropriate method for meeting its business needs with employees capable of safely performing the job requirements.

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[1] The "Age" column reflects the individual's age on the date tested. Those with no age data or with "0" did not provide the information when participating in the exam.

McLane further supplements its response to the specific subpoena requests, without waiver of its objections, as follows:

1. Documents which reflect the name, title, address and telephone number of the person to whom further inquiries should be directed.

Response: All further inquiries regarding this matter should be directed to Ellen L. Perlioni at the address and/or email provided on this letter, as well as Ronald E. Manthey, at the same address or the following email: ron.manthey@morganlewis.com.

2. Documents which reflect the correct legal name and business address of the Respondent and describe the nature of Respondent's business. Include any and all trade names, d/b/a's, or former names. Also include documentation either already in existence or prepared by Respondent in response to this request that describes or provides the following information:

a. the type of corporate or business entity

b. approximate number of employees during each calendar year during the relevant time period

c. location of corporate headquarters

d. current status of the corporation, i.e. active, inactive, or another status

e. the name of Respondent's corporate officers, directors, and owners

f. the statutory agent for Respondent in Arizona

g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

i. Provide the legal name and business address of all superior and subordinate business entities identified.

ii. Provide the statutory agent for all superior and subordinate business entities identified.

Response: In response to the EEOC's request regarding Ochoa's Charge, McLane Sunwest provided information regarding McLane/Suneast, Inc. (a/k/a McLane Sunwest.) McLane provided further information in its Petition to Revoke the Subpoena. McLane supplements these responses as follows:

McLane Company, Inc. is an active Texas corporation. The address for McLane Company, Inc. is P.O. Box 6115, Temple, Texas 76503. Its statutory agent is CT Corporation. At all relevant times, McLane has employed in excess of 500 teammates.

3. Documents which reflect liability insurance that will provide coverage for this charge.

Response: McLane objects to this request as liability insurance is irrelevant to any legitimate investigation the EEOC could be conducting. Liability insurance has nothing to do with legal compliance. The fact that the EEOC seeks information regarding liability insurance suggests that the EEOC is posturing for litigation prior to any investigation or conciliation efforts.

4. Submit copies of any and all employee handbooks in effect from January 1, 2006 to the present and

a. provide documents which reflect in detail how this information is disseminated to employees, and

b. provide documents which reflect the date when any employee handbook went into effect, and the dates of any revisions,

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. Seeking handbooks in their entirety and applicable to every separate but somehow related entity constitutes a fishing expedition. McLane further objects to the temporal scope and the lack of geographic scope.

Subject to its objections and the Petition for Revocation, McLane is producing the following policies applicable to grocery operations: EEO Policy (MCLANE 1-3); EEO Handbook Provision (MCLANE 4); Safety Policy (MCLANE 5); and Pre/Post Employment Physical Requirements Policy (MCLANE 6-8). McLane is also producing:

Bates No.	Effective Date	Policy/Provision
MCLANE 301	July 2005	Equal Employment Opportunity
MCLANE 302	September 2008	
MCLANE 303	January 2010	
MCLANE 304	February 2010	
MCLANE 305	September 2010	
MCLANE 306-307	July 2005	Harassment/ Sexual Harassment/ Investigating and Resolving Complaints
MCLANE 308-309	September 2008	
MCLANE 310-311	January 2010	
MCLANE 312-313	February 2010	
MCLANE 314-315	September 2010	
MCLANE 316	July 2005	Safety
MCLANE 317	September 2008	

MCLANE 318	**January 2010**	
MCLANE 319	**February 2010**	
MCLANE 320	**September 2010**	
MCLANE 321-323	**July 2005**	**Leave of Absence**
MCLANE 324-327	**September 2008**	
MCLANE 328-332	**February 2009**	
MCLANE 333-337	**January 2010**	
MCLANE 338-342	**February 2010**	
MCLANE 343-347	**September 2010**	
MCLANE 348	**July 2005**	**Communication and Conduct**
MCLANE 349	**September 2008**	
MCLANE 350-351	**July 2009**	
MCLANE 352-353	**January 2010**	
MCLANE 354-355	**February 2010**	
MCLANE 356-358	**September 2010**	

The Employee Handbooks are provided to employees upon hire and also following any substantial revisions. Employees receive notification of all minor revisions to

individual policies, and the Handbooks are always available on the Company's internal network, eSERVE.

5. Documents which reflect or a list identifying each test used by Respondent from January 1, 2006 to the present, including but not limited to Industrial Physical Capability Strength test (IPCS) and Isokinetic Physical Capability Test (IPCT), and provide documents which reflect any variations of each test in use

a. For each test variation, provide documents which reflect or a list which identifies all jobs or job classifications for which it has been used,

b. List all alternative names used to describe or refer to each test and variation.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the terms "test" and "variation." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS exam prior to the burden and expense of production of the vast amount of information sought on a nationwide basis as to every separate but somehow related entity. McLane suggests

a staged and less burdensome process to facilitate the EEOC's investigation.

McLane further notes that in response to Ochoa's charge, McLane Sunwest produced detailed information regarding the IPCS test in its position statement, dated April 25, 2008 and the response to the First RFI, dated November 13, 2009, as well as at the interviews of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010, McLane Sunwest produced additional information and data in response to the second Request for Information.

To facilitate the EEOC's analysis, McLane is producing additional information herewith, including information regarding all individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). Given the data clearly shows no disparate impact on individuals over the age of 40, it should dispel any concerns the EEOC may have relating to the ADEA.

6. For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #5 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:

a. provide documents which reflect how the test was developed and how it is used by Respondent,

b. provide documents which reflect the name of each test's or variation's author or creator; the original publication or

creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

c. **provide documents which describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the process. Include copies of all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include copies of any and all documents reviewed by any key decision makers in addition. to paragraph 7 below,**

d. **provide documents which reflect the effective dates of use of each test or variation at each of Respondent's locations,**

e. **provide documents which reflect any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for individual(s) who administer the test and individual(s) who take the test,**

f. **provide documents which reflect a description of how each test or variation is administered and scored, Include documents which reflect a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which**

employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

g. provide documents which reflect or a list of all jobs and job classifications for which any test or variation is used;

h. for each job or job classification for which a test or variation is used, provide documents which identify the specific test or variation (listed in response to paragraph 5) used for that job or job classification,

i. for each job or job classification for which a test or variation is used, provide documents which identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide documents which reflect the details on the process by which any scoring/classification system was established, and provide documents which reflect the details about the process by which Respondent determined the minimum score considered "passing."

j. or each job or job classification for which a test or variation is used, provide copies of the job descriptions.

k. provide copies of any and all adverse impact studies performed for each test or variation.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

Further, the Company objects to this request as it is unduly burdensome and would require each company, related entity and/or operating location to produce and/or create extensive information and documentation including but not limited to the use, development, origination, implementation, scoring, and administration of tests at each facility.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

McLane further notes that in response to Ochoa's charge, McLane Sunwest produced detailed information regarding the IPCS test in its position statement, dated April 25, 2008 and the response to the First RFI, dated November 13, 2009, as well as at the

interviews of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010. McLane Sunwest provided additional information in response to the Second Request for Information.

Subject to its objections and the Petition for Revocation, McLane refers the EEOC to the interview of Janann Williams wherein she extensively discussed the implementation of the IPCS exam. McLane is also producing the following:

Bates No.	Document
MCLANE 9-10	List of physical demands and strength definitions
MCLANE 11-29	IPCS Scheduling Manual
MCLANE 30	IPCS sample test result
MCLANE 31	IPCS rating and Job Task Analysis references for relevant positions
MCLANE 32-33	The IPCS Score—What is it?
MCLANE 45	IPCS Advisement letter
MCLANE 46	IPCS Return to Work Letter
MCLANE 47	Pre-employment Functional Capabilities Evaluation
MCLANE 48	Physical Capability Strength Test: One Component of the New Hire Selection Process
MCLANE 49	IPCS Physical Capability Strength Test
MCLANE 50	Guidelines for Physical Capability Assessment
MCLANE 51	Industrial Physical Capability Services, Inc. Application Information Page

McLane is also producing data reflecting all individuals who took the IPCS exam relating to grocery positions. (*See* enclosed CD).

7. Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #5 and i#6 [sic] **above, to include any notes or other documents concerning development and implementation of the test by Respondent.**

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the terms "test" or "variations." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

McLane further notes that in response to Ochoa's charge, McLane Sunwest produced the validation study provided by Vedder Price P.C., dated January 14, 2005, as Exhibit 15 to the position statement submitted on April 25, 2008. Additionally, the Company produced the validation studies provided by Vedder Price

P.C., dated April 21, 2008 and August 23, 2002, as Exhibits 30 and 31 to the First RFI, dated November 13, 2009.

Subject to its objections and the Petition for Revocation, McLane is producing the following:

Bates No.	Document
MCLANE 52-53	January 14, 2005 Opinion Letter by Thomas G. Abram
MCLANE 54-72	The Effectiveness of the IPCS Physical Capability Evaluation Process for McLane Food Service Company A Validation Study by Thomas B. Gilliam, dated 2008
MCLANE 73-83	An Injury Analysis to Determine the Effectiveness of the IPCS Physical Capability Evaluation (PCE) Program on Injury Claim Costs—An Analysis for Food Service and Grocery Divisions of McLane Company
MCLANE 84-86	April 21, 2008 Letter from Thomas Abram to Industrial Physical Capability Services, Inc. re Isokinetic Physical Capability Test
MCLANE 87-88	August 23, 2002 Letter from Thomas Abram to Industrial Physical Capability Services, Inc. re Isokinetic Physical Capability Test

MCLANE 89-98	Executive Summary re A 24-Month Injury Analysis Comparing the New Hire IPCS Isokinetic Evaluation to the Previous 24-Months New Hire Applicants for a Clothing Retail DSC—A Pilot Program
MCLANE 99-105	A Four-Year Injury Analysis Comparing the IPCS Isokinetic Evaluation to a Functional Capacity/Cardiovascular Evaluation on Reducing Exertion Injuries for a Large Food Manufacturer
MCLANE 106-113	Executive Summary re A 35-Month Injury Analysis Comparing the IPCS Isokinetic Evaluation to a Functional Capacity/Cardiovascular Evaluation on Reducing Injuries for Large Food Distribution Company
MCLANE 114-119	Executive Summary re Comparing the IPCS Isokinetie Evaluation to Individuals Not Tested for a Major L-T-L Trucking Company
MCLANE 120-125	A Two Year Injury Analysis to Determine the Effectiveness of the IPCS Physical Capability Evaluation Program on Reducing Injuries for The World's Largest Food Producer

MCLANE 126-131	Executive Summary re A 19-Month Injury Analysis Comparing the IPCS Isokinetic Evaluation to a Functional Capacity/ Cardiovascular Evaluation on Reducing Injuries for a National Food Distribution Company
MCLANE 132-137	A Comprehensive Analysis and Case Study for A Large US Logistics Trucking Company Showing Injury Rate and Injury Costs Comparing IPCS Tested Employees to Employees Not Tested Over a 3-Year Period.

8. For all positions at Respondent's facilities/ locations nationwide for which any test or variation identified in #5 and #6 above is used, provide a copy of the Job Task Analysis for each position. Include

a. documents which reflect or a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and

b. any documents containing job analysis information for all positions wherein testing is applied to employees and/or new hires.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information.

McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the terms "job analysis" and "testing." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

Subject to its objections and the Petition for Revocation, McLane is producing the Job Task Analysis relating to grocery operations:

Bates No.	Document
MCLANE 138-167	Sample job task analysis report
MCLANE 198-202	Damages & Returns
MCLANE 203-207	Mezzanine Selector
MCLANE 208-214	Cigarette Selector
MCLANE 215-219	Cigarette Stamper
MCLANE 220-225	GMP Selector
MCLANE 226-232	Candy Repack.
MCLANE 233-237	Single Cell Grocery
MCLANE 238-242	Sanitation
MCLANE 243-247	Hand Stamper
MCLANE 248-252	Merchandiser

MCLANE 253-258	Yard Spotter
MCLANE 259-263	Forklift Replenishment
MCLANE 264-269	Delivery Driver
MCLANE 270-274	Full Case Selector (dry goods)
MCLANE 275-279	Full Case Loader
MCLANE 280-286	Stocker
MCLANE 287-291	Maintenance-DC Mechanic
MCLANE 292-296	Mechanic
MCLANE 297-300	Inventory Control

9. For January 1, 2006 to the present date, provide documents or a listing* of information identifying all persons who took any test or variation identified in #5 and #6 in connection with employment at any of Respondent's locations or facilities nationwide. The documents or list should be separated for each facility/ location nationwide and include:

a. name

b. social security number

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel. Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the, field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

c. last known home address and telephone number

d. date of birth

e. date of application

f. date of hire (or promotion), and job classification at hire (or promotion)

g. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

h. position held at the time test was administered (for individuals employed at the time or returning to work)

i. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

j. reason why test was administered to each person tested

k. date and reason for termination (if applicable)

l. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information.

McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's reference to the terms "test" or "variation." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC. This nationwide data is not directed to an age-related analysis and is unnecessary to validating the IPCS test.

McLane further objects to this request as it would require the Company to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested potentially relates to thousands of applicants and/or employees and is not actively tracked and/or maintained by the Company. It would be unduly burdensome for the Company to produce the requested information as it would require the Company to investigate, categorize, classify and identify information regarding employees on a person-by-person basis.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis. In this regard and subject to its objections and the Petition for Revocation, McLane is producing a compilation of data reflecting all individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). As the data clearly shows no disparate impact on individuals over the age of 40, it should sufficiently dispel any concerns the EEOC may have and renders further burdensome production unnecessary.

10. Provide documents which reflect or a list of all Respondent's facilities and locations in existence from January 1, 2006 to the present.

Response: McLane objects to this request as irrelevant, overly broad, and seeking solely to harass the Company. McLane objects to this request and certain terms used therein as vague and ambiguous. Subject to its objections and the Petition for Revocation, the following is a list of all McLane Company, Inc.'s related grocery locations:

Division	Phone	Address
McLane Carolina	252-972-2500	7253 NC Hwy 48, Battleboro, NC 27809
McLane Concord	603-746-8000	932 Maple Street, Contoocook, NH 03229
McLane Cumberland	859-887-8200	1040 Baker Lane, Nicholasville, KY 40356

McLane Dothan	334-678-2700	100 McLane Parkway, Cottonwood, AL 36320
McLane High Plains	806-766-2900	1717 E. Loop 289, Lubbock, TX 79403
McLane Mid Atlantic	540-374-2000	56 McLane Drive, Fredericksburg, VA 22406
McLane Midwest	217-477-7500	3400 E. Main St., Danville, IL 61834
McLane Minnesota	507-664-3000	1111 West 5th Street, Northfield, MN 55057
McLane New Jersey	856-351-6200	742 Courses Landing Road, Carneys Point, NJ 08069
McLane Northeast	315-638-7500	2828 McLane Drive, Baldwinsville, NY 13027
McLane Northwest	253-512-1800	9611 45th Avenue SW Bldg. 4, Lakewood, WA 98499
McLane Pacific	209-725-2500	3876 E. Childs Avenue, Merced, CA 95341
McLane Pennsylvania	570-330-8400	43 Valley View Business Park, Jessup, PA 18434
McLane Southeast	706-357-9540	300 Hwy. 29 North, Athens, GA 30603
McLane Southern	601-833-6761	2104 E. Manufacturers Blvd. NE, Brookhaven, MS 39601
McLane So. California	909-887-7500	4472 Georgia Blvd., San Bernardino, CA 92407-1857
McLane Southwest	254-770-2800	2828 Industrial Blvd., Temple, TX 76501

McLane Suneast	407-931-5200	1818 Poinciana Blvd., Kissimmee, FL 34758
McLane Sunwest	623-935-7500	14149 W. McDowell Rd., Goodyear, AZ 85395
McLane Western	303-682-7500	2100 East Ken Pratt Blvd., Longmont, CO 80504

11. For all Respondent facilities/locations nationwide from January 1, 2006 to the present and with respect to any test or variation identified in #5 and #6 above, provide documents or a list of information identifying all persons by name, last known home address and telephone number, and social security number, who were:

a. terminated because of an inability to pass any test or variation,

b. reassigned and/or transferred because of an inability to pass any test or variation,

c. not hired because of an inability to pass any test or variation,

d. not promoted because of an inability to pass any test or variation,

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the

EEOC's use of the terms "test," or "variation." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

McLane further objects to this request as it would require the Company to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested potentially relates to thousands of employees and is not actively tracked and/or maintained by the Company. It would be unduly burdensome for the Company to produce the requested information as it would require the Company to individually investigate, categorize, classify and identify information regarding applicants and/or employees on a person-by-person basis.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis. McLane is

producing herewith data regarding individuals who took the IPCS exam in relation to grocery positions, (*See* enclosed CD). The data clearly shows that individuals over the age of 40 are not disparately impacted.

12. For each person identified in 11(a) through 11(d), provide documents which reflect:

a date of termination, reassignment, transfer, not hired or not promoted,

b. name and title of the individual who made the decision to terminate, reassign, transfer, not hire and/or not promote the person based on test results.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." McLane objects to this unlimited request relating to any and all testing as a fishing expedition constituting an abuse of process by the EEOC. Without knowing the scope of the EEOC's investigation or any reasonable basis therefore, McLane cannot reasonably respond to this request.

McLane further objects to this request as it would require the Company to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and

production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested potentially relates to thousands of applicants and/or employees and is not actively tracked and/or maintained by the Company. It would be unduly burdensome for the Company to produce the requested information as it would require the Company to individually investigate, categorize, classify and identify information regarding its employees on a person-by-person basis.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis. McLane is producing herewith data regarding individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). The data clearly shows that individuals over the age of 40 are not disparately impacted.

13. For each test or variation identified in #5 or #6, provide any and all documents evidencing any change, whether a reduction or increase, in workplace injuries.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the terms "test," or "variation." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

Subject to its objections and the Petition for Revocation, McLane is producing herewith data regarding individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). McLane also is in the process of compiling and analyzing certain injury data relating to this request and is willing to confer with the EEOC as to an appropriate scope of production relating thereto. The data, however, could not be compiled for production in the limited time period given for the Subpoena. McLane is producing certain validation studies analyzing the IPCS exam and injury data, and concluding that the use of the IPCS strength evaluation has significantly reduced injuries.

14. From January 1, 2006 to the present, if Respondent received any formal or informal complaints by any employee concerning the test(s), or any claims of discrimination based on age, submit documents evidencing the following;

a. name and job title of each person who complained,

b. name and job title of each person receiving each complaint,

c. date of each complaint,

d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the terms "complaints" and "test." McLane objects to this unlimited request for any and all testing and any complaint—formal or informal and regardless of the complaint—as a fishing expedition constituting an abuse of process by the EEOC.

Subject to its objections and the Petition for Revocation, only the following complaint was received from employees in grocery operations alleging age discrimination based on the use of the IPCS test.

Name	Job Title	Division	Date of Complaint	Subject Matter	Actions Taken/Status
Dick Shahenian	Mechanic Contractor	Contractor with McLane Pacific	Feb, 2009	IPCS + Disability/ Age Claim	File with Fresno, CA EEOC (Charge No. 485-2009-00229); Settled during EEOC mediation for $4,160.00 on 8/2009

15. Provide documents or a lists [sic] of all individuals who applied for a position, for which the test identified in #5 and #6 above was in use, at any location or facility of Respondent from January 1, 2006 to the present. Include:

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. date of application

f. whether the applicant was hired, and date and reason for hire or non-hire

g. location at which they applied and position for which they applied,

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test," McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

McLane further objects to this request as it would require the Company to produce or create information,

electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested potentially relates to thousands of applicants and/or employees and is not actively tracked and/or maintained by the Company. It would be unduly burdensome for the Company to produce the requested information as it would require the Company to individually investigate, categorize, classify and identify information regarding its employees on a person-by-person basis.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

Subject to its objections and the Petition for Revocation, McLane is producing herewith data regarding individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). The data clearly shows that individuals over the age of 40 are not disparately impacted.

16. Provide documents or a lists [sic]* **of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #5 and #6 above was in use, at any and** [sic] **location or facility of Respondent from January 1, 2006 to the present. Include:**

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. date promotion sought

f. whether the individual seeking promotion was selected, and, if so, date and reason for selection or nonselection

g. location at which they sought promotion and

h. position for which they sought promotion,

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the, field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

McLane further objects to this request as it would require the Company to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested potentially relates to thousands of employees and is not actively tracked and/or maintained by the Company. It would be unduly burdensome for the Company to produce the requested information as it would require the Company to individually investigate, categorize, classify and identify information regarding its employees on a person-by-person basis.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

Subject to its objections and the Petition for Revocation, McLane is producing herewith data regarding individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). The data clearly shows that individuals over the age of 40 are not disparately impacted.

17. Provide documents or a list* of all individuals who were employed by Respondent at any location or facility nationwide from January 1, 2006 to the present. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. date of, hire

f. all position titles held

g. dates when each position title was held

h. termination date and reason, if applicable.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome, and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous. McLane objects to this unlimited request for employment information for all of its employees nationwide and the reasons for any of their terminations as a fishing expedition constituting an abuse of process by the EEOC.

McLane further objects to this request as it would require the Company to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

Subject to its objections and the Petition for Revocation, McLane is producing herewith data regarding individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). The data clearly shows that individuals over the age of 40 are not disparately impacted.

18. List any and all alternatives to the ICPS or IPCT test that Respondent considered implementing in lieu of the ICPS [sic] **or IPCT test. Include:**

a. copies of all documents Respondent reviewed in considering any such alternatives.

b. copies of all documents relating to any findings, analyses, or determinations made by Respondent regarding any such alternatives.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous. McLane objects to this unlimited request for any and all testing mechanisms considered as a fishing expedition constituting an abuse of process by the EEOC.

McLane refers the EEOC to the interview of Janann Williams relating to the implementation of the test. As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC

to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

McLane continues to be committed to working with the EEOC to produce information in a staged or otherwise less burdensome procedure. McLane is producing a significant amount of documents and data herewith. As indicated herein, McLane is also working to compile additional responsive information.

Should you have any questions or would like to further discuss these requests, please give us a call at the contact information provided herein.

Sincerely,

/s/ Ellen L. Perlioni/uf
Ellen L. Perlioni

cc: BARBARA.RUSDEN@EEOC.GOV
Barbara Rusden
Investigator
Equal Employment Opportunity Commission
3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504

* * *

[Doc. 9-6]

EXHIBIT 22

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December 6, 2011

VIA EMAIL MEENOO.CHAHBAZI@EEOC.GOV AND REGULAR MAIL

Meenoo Chahbazi
Trial Attorney
U.S. Equal Employment Opportunity Commission
3200 North Central Avenue, Suite 690
Phoenix, Arizona 85012

Re: EEOC v. McLane Company
Charge No.: 540-2010-01761

Dear Ms. Chahbazi:

This letter is in response to your correspondence dated November 2, 2011, regarding the meeting we had on August 25, 2011. First, we appreciate that you took the time to meet with us. As we have said, McLane Company, Inc. ("McLane") is committed to equal opportunity for all employees and potential employees. It is equally committed to providing its employees a safe

environment and limiting the risk of workplace injuries by employing individuals in positions within their strength capabilities. McLane believes that the Industrial Physical Capability Services, Inc.'s (IPCS) physical capability evaluation (PCE), along with the detailed job task analysis of the actual work required of the positions, legitimately serves these goals and is consistent with business necessity. If the EEOC has concerns with the IPCS PCE, or suggestions as to the use of the IPCS PCE, McLane genuinely wants to hear them—which is why we requested the meeting to engage in substantive discussions regarding the IPCS PCE, its job-relatedness and validity. Because we believed the EEOC was equally committed to such discussions, a representative of McLane and I flew to Arizona to personally attend the meeting.

Despite our good faith efforts and expense, the EEOC refused to engage in any substantive discussions regarding the merits of the IPCS PCE. The EEOC also refused to substantively confer as to the Subpoenas and the relevance of the information sought—as opposed to one-sided questioning of whether and to what extent McLane would further respond to the Subpoenas.

As we have mentioned, McLane has legitimate concerns with the Subpoenas given the circumstances and given the breadth of information sought. Although it had significant questions as to the legitimacy of this new ADEA "charge number," and objected to the far reaching and overly broad request for information relating thereto, McLane made clear that it would

cooperate with legitimate requests and has produced a substantial amount of information and documents. Among other things, McLane produced IPCS data that clearly indicates that the IPCS PCE has no disparate impact on individuals over 40—which should effectively obviate the EEOC's concerns as they pertain to the ADEA. Yet, the EEOC refuses to discuss the validity of the IPCS PCE and the lack of disparate impact and insists that the only option available to McLane is to capitulate to the Subpoenas in full or face court action.

Given the indisputable data that the IPCS PCE has no ADEA disparate impact, the EEOC's investigation under the ADEA should cease. Notwithstanding, and although it still believes that the EEOC is utilizing this phantom ADEA charge to exceed the scope of a Title VII investigation, McLane provides further response to the Subpoenas set forth below. *This response is subject to and without waiving any and all of its prior objections to the Subpoenas, which are incorporated herein.*

Specific Responses

As we mentioned previously, despite our diligent efforts, we need additional time to compile information and respond to your letter. We are actively working on compiling information and will continue to supplement this response as we are able. We hope to have the outstanding information discussed herein to the EEOC by

December 22, 2011. For now, McLane responds as follows:

4. As agreed when we met, McLane is providing a copy of the Table of Contents for the handbook versions in effect from January 1, 2006 to the present date (July 2005, September 2008, February 2009, July 2009, January 2010, February 2010, September 2010). To the extent the EEOC, believes that any provision of the handbook that has not already been produced is relevant to its investigation, we will further confer as to that provision.

5(a). You indicated that the EEOC does not believe that it has received a complete list identifying all jobs or job classifications for which IPCS is utilized. Specifically, you reference Break/Pack Selector, Checker/Loader, Checker/Loader (QC), Checker/Loader III, Dock Setter, Driver Helper, File Clerk II, Forklift Operator, Fueler, Fueler/Wash, Full Case Selector, Full Case Selector/Freezer, Janitor, MHE, Maintenance Mechanic, Merge Operator, Palletizer, Receiver, Returns, Selector, Selector IV (Sam Candy), Shuttler, Unloader, Yard Driver, Yard Jockey. We have been and are continuing to look into these job titles and intend to provide a complete list as soon as the data compilation is complete. To date, we have learned that some positions may simply be referred to using different "titles."

6(b). We have provided significant information as to the IPCS PCE. In your letter, you indicate that it is unclear whether the IPCS PCE was originally developed for material handlers in the airline industry based on

certain validation studies conducted in conjunction with American Airlines. You request that McLane clarify the creation date of the IPCS PCE and the employer or industry for which the test was originally designed. It is our understanding that a validation study was conducted in collaboration with American Airlines. We do not, however, believe that the IPCS PCE was developed exclusively for use with material handlers in the airline industry. It is our understanding that the IPCS PCE was developed for use in a wide variety of industries with positions correlating to the physical capability categories developed by the Department of Labor. McLane cannot independently corroborate the creation date for the IPCS PCE. Based on literature from IPCS, McLane believes that the IPCS PCB was developed by Dr. Thomas B. Gilliam in 1998 and has been validated several times since its development.

6(c). As you note, Janann Williams met with EEOC representatives to discuss the decision to utilize and implement IPCS. Ms. Williams already provided the EEOC with the names of the other individuals involved in the decision—as reflected by the names included in your letter. You have recited the names accurately. We are also investigating whether any of the additional documents you requested exist and we will further supplement this response.

6(d). You requested the dates that the IPCS PCE was implemented at each grocery location. The following chart contains the IPCS PCE implementation dates for grocery locations:

McLane Grocery Division	
IPCS Implementation Date	
Location	First Test Date
New Jersey—Drivers	3/5/2004
New Jersey—Warehouse	3/8/2004
Danville—Midwest	4/17/2005
Brookhaven—Southern	10/20/2006
Baldwinsville—Northeast	10/25/2006
Goodyear—Sunwest	10/25/2006
Fredericksburg—Mid Atlantic	10/27/2006
Athens—Southeast	11/16/2006
San Bernardino—So. California	12/20/2006
Contoocook—Concord	1/2/2007
Lubbock—High Plains	1/8/2007
Merced—Pacific	1/18/2007
Kissimmee—Suneast	3/1/2007
Temple—Southwest	3/8/2007
Longmont—Western	4/25/2007
Battleboro—Carolina	5/1/2007
Temple—E-Distribution	6/28/2007
Northfield—Minnesota	9/18/2007
Nicholasville—Cumberland	1/4/2008
Tacoma—Northwest	1/16/2008
Jessup—Pennsylvania	3/12/2008

Your letter also requests dates specific to hiring, promotion, transfer or return-to-work for each position at each location. To clarify, once the IPCS PCE was implemented at a location, it applied to all new hires, all employees seeking an alternative position that required

greater physical capabilities, and all employees returning from a leave of absence of 30 days or more—assuming the position was physically demanding such that IPCS PCE was required. We are investigating whether implementation dates differed for new hire testing versus other types of testing. If we are able to determine that there is any difference we will notify you accordingly.

6(f). McLane has provided substantial documents and information relating to the IPCS PCE. As explained previously and in documents provided: To calculate the IPCS score from the isokinetic evaluation, the following measurements are necessary:

- ☐ Peak Torque—how many foot pounds of torque are generated during each major movement pattern (i.e. knee flexion/extension and shoulder flexion/extension).

- ☐ Body Symmetry ratio scores—the relationship of various body segments is critical to the worker performing the essential functions of the job safely, Specifically, the relationship of the shoulder flexors to the shoulder extensors, knee flexors to the knee extensors, right to left comparisons for the flexors and extensors for the shoulder and knee. In addition, the upper strength relative to the lower body strength is determined.

- ☐ Force curve analysis—each major set of force curves is objectively evaluated for normalcy. The score ranges from 0.0 to 1.0 where 0.0 is a flat line curve (no force generated) to a perfect shaped

curve, which is a 1.0. The force curve is not determined by age or gender. Perfect force curves can be generated by young and old or male and female.

☐ Body weight—body weight is divided into the final absolute score. Body weight is used to make sure the force generated is adequate to not only support an individual's body weight but also to safely perform the essential functions of the job. This means that a person who weighs 250 pounds needs to generate more torque that [sic] a person who weighs 150 pounds.

The body weight factor also has the effect of neutralizing differences between genders since (generally) most females weigh less than males.

These measurements are then applied to a "validated mathematical model," which generates the IPCS physical capability index score. This mathematical formula is considered highly confidential and proprietary to Industrial Physical Capability Services, Inc. McLane does not know and cannot provide the mathematical formula.

6(g). See response to 5(a) above. Additional information will be forthcoming.

6(i). McLane has provided significant information and documentation regarding the IPCS PCE. The DOL physical capability category is determined through the job task analysis prepared by GMSI. The following chart summarizes the physical demand categories and corresponding IPCS score:

Less than Sedentary		Exerting up to 5 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or a negligible amount of force frequently (activity or condition exists from 1/3 to 2/3 of the time) to move objects.
Sedentary	.2522	Exerting up to 10 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or a negligible amount of force frequently (activity or condition exists from 1/3 to 2/3 of the time) to move objects.
Light	0.59	Exerting up to 15 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or up to 5 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or a negligible amount of force constantly to move objects.
Light-Medium	0.83	Exerting 15 to 20 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 5 to 10 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or greater than negligible up to 5 pounds of force constantly to move objects.

Medium	1.08	Exerting 20 to 35 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 10 to 15 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or greater than negligible up to 10 pounds of force constantly to move objects.
Medium-Heavy	1.32	Exerting 35 to 50 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 15 to 25 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or 10 pounds of force constantly to move objects.
Heavy	1.56	Exerting 50 to 75 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 25 to 40 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or 10 to 15 pounds of force constantly to move objects.
Heavy-Very Heavy	2.00	Exerting 75 to 100 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 40 to 50 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the

		time), and/or 15 to 20 pounds of force constantly to move objects.
Very Heavy	2.43	Exerting in excess of 100 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or in excess of 50 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or in excess of 20 pounds of force constantly to move objects.

It is our understanding that IPCS developed the scoring through analysis of employees performing the type of work described in the physical capability rating. As mentioned above, the mathematical formula utilized to determine the physical capability score is considered highly confidential and proprietary to Industrial Physical Capability Services, Inc. McLane does not know and cannot provide the mathematical formula. It is unclear what else, if anything, the EEOC seeks in response to this request. If you could further clarify what you believe to be "incomplete," we will further investigate.

6(j). You stated that you do not believe McLane has provided the EEOC with all job task analyses (JTA) relating to the grocery positions for which IPCS PCE is utilized. To ensure there is no doubt, we are compiling a complete set of job task analyses for grocery positions. We are working on confirming that no other

JTAs exist for grocery positions and we will supplement with the compilation of the JTAs.

6(k). All adverse impact studies relating to McLane's utilization of the IPCS PCE have been produced. McLane did not do any analysis separate from that undertaken by IPCS.

8. See response to 6(j). We are working on compiling information as to the JTAs and will supplement this response.

9, 11, 12, 15, 16. It is not clear why the EEOC needs the individual's names, social security numbers, last known addresses, phone numbers or other personal identifiers to analyze the validity and/or impact of the IPCS PCE. McLane provided significant data that allows the EEOC to analyze both the validity and the impact of the IPCS PCE—which shows that it has no disparate impact on individuals protected by the ADEA. We will further compile a list of facilities where IPCS PCE is administered in relation to positions within the grocery division. We will also provide further response defining and explaining the variables. Once we have been able to compile this additional information, we will supplement this response.

13. We are working on compiling and analyzing the information relating to workplace injuries and the impact of IPCS PCE. We will supplement with this information.

14. We are investigating this request to see if any supplemental information can be provided.

17. We remain perplexed by this request seeking personal information regarding every employee nationwide, regardless of position. We see no reason this information is relevant to the EEOC's investigation and you were unwilling to discuss relevance when we met.

18. To the extent we can identify any alternative tests considered, we will supplement this response.

As mentioned above, we are actively working to compile additional information and further respond. We will supplement this response as further information becomes available. In the interim, if you have any questions, please let us know.

Sincerely,

/s/ Ellen L. Perlioni
Ellen L. Perlioni

[Doc. 9-6]

EXHIBIT C

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc., Respondent.	Case No. 2:12-mc-00007-GMS **DECLARATION OF KEVIN J. KOCH IN SUPPORT OF RESPONDENT MCLANE COMPANY, INC.'S RESPONSE TO PETITIONER'S APPLICATION FOR ORDER TO SHOW CAUSE WHY ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

DECLARATION OF KEVIN J. KOCH

I, KEVIN J. KOCH, declare as follows:

1. I have personal knowledge of the facts and matters set forth in this declaration and could and would testify competently and truthfully to the same if called as a witness and placed under oath. I am over 18 years of age.

2. I make this declaration in support of Respondent McLane Company, Inc.'s ("McLane") Response to Petitioner's Application for Order to Show Cause why Administrative Subpoena Should Not be Enforced.

3. I am the Vice President of Accounting, Tax, Finance and Governmental Affairs for McLane. I work for McLane and reside in Texas. In my position with McLane, my responsibilities include McLane's banking and treasury functions and I have knowledge of the same, as well as McLane's corporate operations and operating structure hierarchy, including its operating subsidiary corporations.

4. Respondent McLane is a Texas Corporation with its corporate headquarters and principal place of business located in Temple, Texas. It is a supply chain services company that, through its operating subsidiary corporations, supplies grocery products to convenience stores, mass merchants, and drug-stores throughout the United States.

5. In addition to having several discrete operating locations, McLane owns several operating subsidiary corporations that own and operate divisional

distribution centers throughout the United States. For example, in its "Grocery" business, McLane has several corporate subsidiaries, one of which is McLane/ Suneast, Inc. which operates a distribution center in Goodyear, Arizona doing business as McLane Sunwest ("McLane Sunwest.") McLane/Suneast, Inc. is a Texas corporation with its corporate headquarters and principal place of business located in Temple, Texas.

6. Separate from Grocery operations is McLane Foodservice, Inc. which provides supply chain solutions for restaurants, with distribution centers around the country ("Foodservice"). Foodservice is a Texas corporation with its corporate headquarters and principal place of business located in Carrollton, Texas.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 15, 2012, at Temple, Texas.

/s/ Kevin J. Koch
KEVIN J. KOCH

— —

[Doc. 9-9]

EXHIBIT D

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc., Respondent.	Case No. 2:12-mc-00007-GMS **DECLARATION OF JANICE WORSHAM IN SUPPORT OF RESPONDENT MCLANE COMPANY, INC.'S RESPONSE TO PETITIONER'S APPLICATION FOR ORDER TO SHOW CAUSE WHY ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

DECLARATION OF JANICE WORSHAM

1. I, Janice Worsham, declare as follows:

2. I have personal knowledge of the facts and matters set forth in this declaration and could and would testify competently and truthfully to the same if called as a witness and placed under oath. I am over 18 years of age.

3. I make this declaration in support of Respondent McLane Company, Inc.'s ("McLane") Response to Petitioners Application for Order to Show Cause why Administrative Subpoena Should Not be Enforced.

4. I am currently employed by McLane in the position of HRIS Manager. I have held this position since 09/26/2010. As the HRIS Manager, my primary responsibilities include the support (including reporting) and maintenance of HR systems, mainly PeopleSoft. Prior to my current position, I held the position HR Business Analyst. I have been employed by McLane since 12/17/2007. Based on my positions and duties, I have personal knowledge of the PeopleSoft database utilized at McLane.

5. McLane is a supply chain services company, providing grocery supply chain solutions for convenience stores, mass merchants, and drug stores throughout the United States. McLane utilizes a PeopleSoft database to record, track and maintain employment information and records relating to employees. PeopleSoft does not contain any records relating to job applicants.

6. I understand that the EEOC is investigating McLane in relation to its use of the Industrial Physical Capability Services ("IPCS") physical capability exam ("PCE"). PeopleSoft does not track whether or when an individual may have taken the IPCS PCE. There is no way to generate a list from PeopleSoft of those employees who were terminated, demoted, or not hired because they were unable to achieve the minimum physical capability rating to safely perform the essential functions of the position for which they took the IPCS PCE.

7. I have been told that IPCS generated an excel spreadsheet from its database that includes all individuals who have taken the IPCS PCE relating to positions within any of the Grocery operations for McLane ("IPCS Grocery database"). I have been told that the IPCS Grocery Database includes the individuals' names and social security numbers, among other things. I have been told that as of January 20, 2012, the IPCS Grocery Database reveals that 13,883 IPCS PCE were administered for Grocery operations. I am unaware of the volume of data that may exist relating to the separate corporate entity of McLane Foodservice, Inc. ("Foodservice").

8. I understand that the EEOC is seeking information regarding every one of the 13,883 individuals in the IPCS Grocery Database. I believe we could develop and run multiple queries in PeopleSoft to obtain some, but not all, of the information that I understand the EEOC to be requesting. Utilizing the IPCS Grocery

Database, we could likely use multiple queries in PeopleSoft to obtain last known address and home phone, original date of hire, job code at hire, date of termination and the coded reason for termination for all employees that were actually hired. To obtain this particular information that is likely available through a PeopleSoft query would take approximately 10-15 hours, assuming no glitches. Any inaccurate social security numbers will add time to the analysis and will require individualized name searching.

9. PeopleSoft does not track date of application. I believe that a manual search for each of the 13,883 individuals' applications would be required to identify date of application—if such information is available through some source other than PeopleSoft. PeopleSoft does not track IPCS PCE dates and thus could not generate information as to the position held at the time of the IPCS PCE. Also, it would be almost impossible to use a query to generate a report of dates of "promotion" for all of those employees listed on the IPCS spreadsheet. There are so many variables in the job codes reflecting changes to job status, it would require a manual analysis of every job change to determine if the change reflected an actual promotion, and there would be numerous job code changes for every individual in the system.

10. I have been informed that in the IPCS Grocery Database, there are 2,351 IPCS PCE records denoted as not meeting the minimum requirements for the position for which the individual took the IPCS PCE, and for which the EEOC seeks information as to

whether any employment action occurred as a result. Of those, 1,942 individuals did not achieve the minimum requirements to safely perform the essential functions of the position they sought in relation to a IPCS PCE denoted as "New Hire." Assuming that none of the 1,942 individuals were hired, no PeopleSoft data would be available for those individuals.

11. I understand that the EEOC is requesting a list of employees terminated or demoted because they did not achieve the minimum physical capability rating to safely perform the essential functions of a position sought. Assuming the social security numbers in the IPCS Grocery Database are accurate, we would have to manually search these 409 individuals in PeopleSoft to determine whether a job change occurred around the time of the IPCS PCE date (2,351 [Individuals denoted as not achieving the minimum requirements]—1,942 [Individuals denoted as not achieving the minimum requirements for a "New Hire" tests and thus not in PeopleSoft] = 409). This step would be necessary to provide as much information as possible to assist the local human resource representatives in correctly identifying and retrieving the history for the individual. Although we could try and automate this search some by searching for job changes within 90 or so days of the IPCS PCE date, it will require manual analysis and multiple unique queries because of the differing test dates for the individuals. From the PeopleSoft perspective, I believe that this will require at least 25 hours of work. Thereafter, we would need to

get confirmation from local human resource representatives as to each individual identified as having a negative job action within the designated window of time following the IPCS PCE. Confirmation is necessary because the job action could have occurred for reasons unrelated to the IPCS PCE. For example, an individual may have not achieved the minimum necessary requirement on the IPCS PCE, and simply elected to terminate for other reasons (i.e., they elected not to take the IPCS PCE again because they found an intervening higher paying job). The process of confirmation would likely take an average of 30 minutes per person for a total of approximately 205 hours.

12. The PeopleSoft analysis described above would need to be undertaken by me, as I am the primary resources [sic] with the technical capability to perform the queries. Given my other obligations, I could not work on this project full time and would need to build in additional time for completion. Only two people—I and one other teammate—have the ability to work in PeopleSoft, supporting all employment changes and reports needed. Our work often must be completed within a short timeframe to remain compliant with all laws and to meet business necessity. It is therefore impossible to ignore all of our other obligations and work exclusively on retrieving this data. I estimate that I could dedicate 10 hours per week to this project, assuming no emergencies arise.

13. All of this assumes I am only analyzing Grocery Operations. The inclusion of Foodservice would increase all of these estimates.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 15, 2012, at Temple, Texas.

/s/ Janice Worsham

* * *

[Doc. 9-11]

EXHIBIT F

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc., Respondent.	Case No. 2:12-mc-00007-GMS **DECLARATION OF MILINDA SILL IN SUPPORT OF RESPONDENT MCLANE COMPANY, INC.'S RESPONSE TO PETITIONER'S APPLICATION FOR ORDER TO SHOW CAUSE WHY ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

DECLARATION OF MILINDA SILL

1. I, MILINDA SILL, declare as follows:

2. I have personal knowledge of the facts and matters set forth in this declaration and could and would testify competently and truthfully to the same if called as a witness and placed under oath. I am over 18 years of age.

3. I make this declaration in support of Respondent McLane Company, Inc.'s ("McLane") Response to Petitioners Application for Order to Show Cause why Administrative Subpoena Should Not be Enforced.

4. I am currently employed by McLane in the position of Talent Manager. I have held this position since

March 2010. As the Talent Manager, my primary responsibilities are for recruiting and affirmative action plans. Prior to my current position, I held the following positions: Executive Secretary, Information Security Analyst and Technology HR Manager. I have been employed by McLane since April 2000. Based on my positions and duties. I have personal knowledge of the recruiting and hiring processes at McLane, as well as the methodology for applicant tracking.

5. McLane is a supply chain services company, providing grocery supply chain solutions for convenience stores, mass merchants, and drug stores throughout the United States. With regard to its "Grocery" business, McLane has the following distribution centers:

Division	Address
McLane Carolina	7253 NC Hwy 48, Battleboro, NC 27809
McLane Concord	932 Maple Street, Contoocook, NH 03229
McLane Cumberland	1040 Baker Lane, Nicholasville, KY 40356
McLane Dothan	100 McLane Parkway, Cottonwood, AL 36320
McLane High Plains	1717 E. Loop 289, Lubbock, TX 79403
McLane Mid Atlantic	56 McLane Drive, Fredericksburg, VA 22406
McLane Midwest	3400 E. Main St., Danville, IL 61834
McLane Minnesota	1111 West 5th Street, Northfield, MN 55057

McLane New Jersey	742 Courses Landing Road, Carneys Point, NJ 08069
McLane Northeast	2828 McLane Drive, Baldwinsville, NY 13027
McLane Northwest	9611 45th Avenue SW Bldg. 4, Lakewood, WA 98499
McLane Pacific	3876 E. Childs Avenue, Merced, CA 95341
McLane Pennsylvania	43 Valley View Business Park, Jessup, PA 18434
McLane Southeast	300 Hwy. 29 North, Athens, GA 30603
McLane Southern	2104 E. Manufacturers Blvd. NE, Brookhaven, MS 39601
McLane So. California	4472 Georgia Blvd., San Bernardino, CA 92407-1857
McLane Southwest	2828 Industrial Blvd., Temple, TX 76501
McLane Suneast	1818 Poinciana Blvd., Kissimmee, FL 34758
McLane Sunwest	14149 W. McDowell Rd., Goodyear, AZ 85395
McLane Western	2100 East Ken Pratt Blvd., Longmont, CO 80504
McLane Ozark	2788 E. Sawyer Road, Republic, MO 65738

The above chart of Grocery distribution centers does not include any of the operations of McLane Foodservice, Inc. ("Foodservice"). Foodservice provides supply chain solutions for restaurants with 18 separate distribution centers around the country.

6. Each of the 21 different Grocery distribution centers has a local human resource ("HR") manager responsible for the recruiting at that facility. The local HR managers have various different procedures for recruiting, tracking applicants and retaining related documents.

7. The vast majority of recruiting activities at the Grocery facilities relate to physically demanding positions for which physical capability exams through Industrial Physical Capability Services, Inc. ("IPCS") are currently required. Individuals either apply for these positions on-line through McLane's website or submit hard copy applications to the facility. McLane's on-line application process is not an applicant tracking system. Rather, it is merely an Outlook-based routing system that sends the application to the "staffing mailbox" for the appropriate HR representative handling the particular position. Depending on the practice of the particular HR representative, applications submitted through the website could be printed and maintained in hard copy files, or saved in Outlook files as an attachment to the email sent to the staffing mailbox or other similar practice.

8. As an example of my process, I receive emails in my staffing mailbox with applications and/or resumes attached. I review the application and make notations in the email subject line for the disposition of the candidate's application. If I decide to move forward with a candidate. I mark the email in green (I use red if I am not interested in pursuing the candidate further). I file the emails in Outlook subfolders specific to

the particular position for which we are recruiting. I have trained newer HR representatives to use a similar system, but various alternative practices still remain.

9. Applicant tracking is a manual process whereby each local HR manager, or a clerk or other such delegate, maintains an excel spreadsheet with certain fields of information regarding the applicant. The spreadsheets are maintained by facility, by year and retained for two years. I know that some but not all of the Grocery facilities have the spreadsheets for 2009 to the present. Older applicant logs may no longer exist, and will be difficult to locate even if they do still exist.

10. Currently, the excel spreadsheet captures the following information: Last Name, First Name, Applied for which open position, Date applied, Internal/external, Gender, Ethnic Group, Vet Status, Referral Source, Referral Source Name. Last Phase Achieved (disposition), Specific Disposition, and Comments—assuming that all fields are completed correctly.

11. A different version of the spreadsheet was used before this year. Although I do not know exactly how far back the prior version was used. I do know that for the last couple of years, the spreadsheet that was used was designed to capture the following fields: Last Name, First Name, Position for Which Hired, Date applied, Internal/external, Gender, Ethnic Group, Vet Status, Minimally Qualified, Referral Source. First Interview Date, Referred, Second Interview Date, Third

Interview Date, Hired/Not Hired, Offer Date, Reason Not Hired, Comments.

12. If an applicant is hired, their current address and social security number will be entered into PeopleSoft. Prior to the time that an applicant is hired and completes new employee paperwork, we do not request social security numbers. Therefore, if a candidate is not hired, we will never know their social security number, unless they happened to include it on a resume they may have submitted.

13. If an applicant is not hired, their last known address and phone are not logged. The only way to obtain such information would be a manual review of the application or resume they may have submitted—which, as discussed above, could be located in various places such as an attachment to an email saved in an Outlook folder or hard copy files.

14. I have been told that as of January 20, 2012, IPCS data reveals 12,418 IPCS PCE were administered for *new hire* testing for Grocery operations. Of those, 1,942 individuals did not achieve the minimum requirements to safely perform the essential functions of the position they sought. Assuming that none of the 1,942 individuals were hired, no PeopleSoft data would be available, including no social security numbers. Last known addresses and phone numbers would not be available on any log or in any database. To obtain last known addresses and phone numbers would require a manual search of hard copy or outlook files, assuming the applications and resumes still exist.

15. I did some sample searching to see how this might be accomplished using my system of saving the emails in Outlook. If the resume is saved in Outlook, I was able to search for the applicant's name, but this did not always yield a positive result and further folder searching was necessary. Also, after 90 days, emails are archived in a "vault." For those emails already vaulted in subfolders, I could not run a general search and had to first find the actual subfolder to find the applicant's name and then to open the attached resume or application. For those Grocery facilities that do not save applications on Outlook, manual searching of hard copy files would be necessary.

16. Considering all of the variables, I estimate that locating last known addresses, to the extent they still exist, for these applicants would take 30 minutes per person on average. Assuming 1,942 such candidates, using the average of 30 minutes per candidate, this would require 58,260 minutes/971 hours to complete, building in no extra time to account for anomalies and the more time intensive search for the more dated applications. I am also fairly certain that such records will not exist back to 2006. For the most part, this search would have to be done at the local facility site and would be very disruptive to the operations.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 16, 2012, at Temple, Texas.

/s/ Milinda Sill
MILINDA SILL

[Doc. 15]

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ATTORNEYS FOR PETITIONER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, v. McLane Company Inc., Respondent.	CASE NO. 2:12-MC-00081-PHX-GMS **EEOC'S REPLY TO MCLANE'S RESPONSE TO APPLICATION FOR ORDER TO SHOW CAUSE** (Filed Oct. 23, 2012)

Respondent McLane Company Inc. ("McLane") changes its position to serve its self-interest in a way that rivals the best flip-floppers. McLane previously criticized the EEOC for combining its requests for information in its Title VII/ADA and ADEA investigations, both of which focus on McLane's use of a physical capability exam ("PCE"). Now that EEOC has issued separate subpoenas and move separately to enforce

those subpoenas, McLane argues they should be treated the same. McLane cannot have it both ways. The ADA/Title VII investigation is not the "second bite" of the ADEA investigation; each investigation arises out of different charges alleging different categories of discrimination. Here, the Ochoa charge alleges systemic discrimination based on sex, pregnancy, and disability. Moreover, the Title VII/ADA investigation extends beyond disparate impact to disparate treatment including failure to provide reasonable accommodations under the ADA. McLane admits it cannot provide information about medical conditions or disabilities of those taking the PCE. Thus, EEOC has the authority to seek relevant pedigree information[1], and McLane has not shown the information sought is overbroad or unduly burdensome. The Court should grant EEOC's application to enforce the subpoena so that

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[1] Approximately 20 months have passed since EEOC issued the subpoena at the heart of this action. During that time, EEOC has engaged in numerous conversations with McLane concerning the subpoena, and EEOC has agreed to drop certain requests. Conversely, McLane has provided much of what EEOC requested, including a *corrected* production on September 5, 2012, three weeks *after* EEOC filed the present enforcement action. Thus, the information which EEOC is pursuing in this action is limited to the following "pedigree information" for each test-taker: name, social security number, last known address and telephone number, medical condition (if known), date of hire, position held (only with respect to employees applying for promotions and transfers), and reason for termination if is related to the PCE result. Subpoena Requests 8a-c, e, g, i, l. EEOC is also seeking pedigree information for individuals adversely impacted because they failed the PCE. Subpoena Requests 10, 11a, 14 and 15.

EEOC can finally complete what has now become nearly a five-year investigation.

I. EEOC Has Satisfied All Requirements for Subpoena Enforcement

The parties agree that *E.E.O.C. v. Children's Hosp.*, 719 F.2d 1426, 1428 (9th Cir. 1983) provides the framework for analyzing EEOC subpoenas. In *Children's*, the Ninth Circuit held the scope of judicial inquiry "is quite narrow" and the questions are:

> (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation.

719 F.2d at 1428. McLane does not contest the second prong, and its discussion of the other two prongs is focused on this Court's ADEA decision, which is distinguishable because it was based on different facts and law.

A. EEOC Has The Authority To Investigate

Once a charge is filed, EEOC is "required to investigate the charge." *EEOC v. Fed. Ex. Corp.*, 558 F.3d 842, 854-56 (9th Cir. 2009) (citation omitted). "[T]he original charge is sufficient to support EEOC administrative action . . . for any discrimination stated in the charge itself or discovered in the course of a reasonable

investigation of that charge." *EEOC v. Hearst Corp.*, 553 F.2d 579, 580 (9th Cir. 1976). If a charge "raises the specter of systemic discrimination, EEOC has the authority to investigate . . . beyond the alleged individual discrimination." *Fed. Ex.*, 558 F.3d at 855. Thus, a company-wide policy warrants a company investigation and response. *See id.* Moreover, if EEOC uncovers additional facts related to the charge, it is "neither obliged to cast a blind eye" nor to initiate a new charge and conduct a "repetitive investigation." *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364-65 (4th Cir. 1976).

Here, Ochoa's Charge, in addition to alleging a policy of gender and pregnancy discrimination, on its face specifically alleges a pattern or practice of discrimination against disabled employees and new hires: "The Physical Capability Strength Test is given to all employees returning to work from a medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended." Charge, Did. 2-1, Ex. A, Att. 1. EEOC is therefore entitled to investigate the affects [sic] of the PCE company-wide. *See Fed. Ex.*, 558 F.3d at 855.

In addition, EEOC uncovered other allegations that McLane fails to accommodate individuals with disabilities, refuses to engage in the interactive process, and systemically discriminates based on the company's rigid and uncompromising use of the PCE. *See* Decl., Ex. 3 (filed under seal) (describing the experiences of a former McLane employee with cancer who was told, while she was undergoing chemotherapy, that she would be terminated unless she took the PCE); *see*

also Charges, Ehxs. 1 & 2 (filed under seal) (describing alleged ADA violations in California and Arizona resulting from McLane's use of the PCE). EEOC is not "obliged to cast a blind eye" to these allegations, which provide additional bases for the present investigation. *Gen. Elec. Co.*, 532 F.2d at 365.

B. The Information Sought Is Relevant and Material.

1. EEOC Needs to Contact Test-Takers To Investigate Disability Discrimination.

Unlawful discrimination under the ADA includes "utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability" 42 U.S.C. § 12112(b)(3)(A). Discrimination also includes "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria . . . is shown to be job-related for the position in question and is consistent with business necessity." §12112(b)(6). Further, it is unlawful to deny reasonable accommodations to a qualified individual with a disability or to deny employment opportunities "if such denial is based on the need . . . to make reasonable accommodation." §12112(b)(5). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can

perform the essential function of the employment position such individual holds or desires." § 12111(8).

Here, McLane has failed to provide *any* information regarding medical conditions or disabilities of the rejected applicants or employees who were fired after taking extended medical leave. Because McLane argues it cannot provide this information, *see* Resp. at 16, EEOC needs to be able to contact all test-takers to determine if they are disabled under the ADA and whether they would otherwise be qualified to perform the positions they held or desired. Once EEOC identifies test-takers with disabilities, it will be able to analyze adverse impact and disparate treatment, such as failure to accommodate under the ADA. Without information such as name, address, phone number, and social security number,[2] EEOC cannot even begin to investigate the ADA allegations.

McLane argues EEOC should not receive information regarding individuals with disabilities to the extent McLane was unaware of the disabilities. Resp. at 8-9. This argument is beside the point during subpoena enforcement, as EEOC should not be forced to abandon its obligation to independently investigate charges and simply accept as established fact McLane's assertion that it was not aware of any individuals' disabilities. Moreover, under the ADA, EEOC

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[2] Social security numbers provide EEOC with a way to find individuals who have moved or changed telephone numbers, and they are unique identifiers that can be used to confirm the accuracy of the data otherwise provided by McLane.

may investigate for both disparate impact and disparate treatment. *See E.E.O.C. v. Kronos Inc.*, 620 F.3d 287, 300 (3rd Cir. 2010). While McLane may or may not have been aware of certain test-takers' disabilities (a fact question not appropriate for resolution at the subpoena enforcement stage), the ADA also prohibits employment practices which adversely impact disabled individuals regardless of the employer's intent. *See* 42 U.S.C. §12112(b)(3)(A), (b)(6). As such, EEOC needs to contact test-takers and identify individuals with disabilities to analyze whether any were adversely impacted by McLane's use of the PCE.

McLane also appears to argue that no one who took the PCE could have been disabled because test-takers certified they were physically capable of participating in the test. Resp. at 9. This argument is not only illogical but inconsistent with the law. First, just because one is capable of performing the test does not mean that person is not disabled or that he was not in need of a reasonable accommodation. Second, the argument assumes that the PCE is valid and consistent with business necessity, a defense which is still under investigation and which is entirely inappropriate for determination during a subpoena enforcement proceeding. *See McGregor v. National R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999) (recognizing that the determination of whether a test-taker is "qualified" under the ADA requires an individualized assessment); *Children's*, 719 F.2d at 1429 ("[A] party may not defeat agency authority to investigate with a claim

that could be a defense if the agency subsequently decides to bring an action against it.").

2. McLane's Assumptions Regarding the Applicability of the ADEA Order Are Unfounded.

McLane asserts that it need not produce identities and contact information in this Title VII/ADA investigation because it was not ordered to produce that information in the ADEA proceeding.[3] But McLane neglects to mention key aspects of the Court's findings in the ADEA proceedings that favor a different outcome here. For example, the Court observed during the March 23, 2012 hearing in the ADEA proceeding that test-takers' identities and contact information was not necessary for EEOC to carry out a statistical analysis of whether the test adversely impacted individuals 40 and over. Transcript at 22-23 Only after concluding

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[3] McLane also attaches hundreds of irrelevant documents from the ADEA proceedings in an attempt to twist the facts regarding the ADEA investigation. However, at the ADEA subpoena enforcement hearing held on March 23, 2012, the Court found that McLane had failed to support its accusations that the Commission was using the ADEA investigation for any improper purpose. EEOC urges the Court to ignore McLane's unfounded and unsupported accusations. Tr. at 5. In fact, the Court advised McLane that it did "not want to hear any argument" regarding such allegations. *Id.* The Court further recognized that EEOC can uncover evidence "in a Title VII or an ADA investigation which may provide a legitimate basis for them to begin their own ADEA investigation." Tr. at 4. Additionally, McLane's allegation that EEOC is using "overreaching tactics" is based wholly on hearsay and the statements of people without direct knowledge.

EEOC had not shown that McLane violated the "four-fifths rule" did the Court determined that McLane would not be required to produce contact information. Dkt. 34 at 5.

In the instant Title VII investigation, however, not only is EEOC investigating more than a statistical basis for possible discrimination, but the statistical evidence indicates McLane's application of the PCE *violates the four-fifths rule* with respect to gender [Exh. 5, Cadle Dec.]. Therefore, pursuant to the Court's prior rulings, McLane should be required to produce the identities and contact information for all females adversely affected by the PCE. *See* Dkt. 34 at 5. In addition, although the Court previously observed that contact information was not necessary for a statistical analysis in the age context, the present ADA investigation is not limited to a purely statistical analysis of the possible adverse impact of the PCE on disabled individuals. Even if the ADA investigation were so limited, McLane's admitted inability to provide any disability information puts the instant investigation in stark contrast to the age discrimination investigation. Here, EEOC has no idea which or how many, of the test-takers were disabled, and absent contact information EEOC will never be able to uncover this information and adequately investigate the ADA charges pending against McLane.

[3.] Identities and Contact Information Are Relevant To Both Disparate Impact and Disparate Treatment Cases.

McLane alleges that decisions such as *EEOC v. CRST Van Expedited, Inc.* and *State ex rel. Terry Goddard, Attorney General v. Geo Group, Inc.* do not provide support for the EEOC's position that it needs to identify putative class members because *CRST* and *Geo* are disparate treatment cases. Resp. at 17. However, EEOC is currently investigating both disparate treatment and disparate impact allegations. Additionally, should EEOC find that McLane's testing policies disparately impact test-takers on the basis of sex, pregnancy, or disability, EEOC will have an obligation to engage McLane in efforts to conciliate. *See* 42 U.S.C. §2000e-5(b). To the extent that a monetary settlement was reached, EEOC would need to identify and distribute funds to the individuals harmed by McLane's unlawful employment practices.

II. The Information Sought Is Not Overbroad

It is McLane's burden to demonstrate that EEOC's subpoena is overbroad and it has not met that burden here. *Children's*, 719 F.2d at 1428.

A. EEOC Is Not Seeking Information for Food Services in this Proceeding.

Although McLane repeatedly references its food service division, EEOC is not seeking information

regarding McLane Foodservices in this subpoena proceeding. The current subpoena was directed to McLane Company Inc., which encompasses the grocery division, not the separately-incorporated McLane Foodservice.

B. McLane Agreed to a Nationwide Investigation of the Grocery Division.

McLane repeatedly states that it has agreed to provide data comparable to that ordered in the ADEA proceeding, including nationwide data regarding test scores, gender, and adverse actions taken against test-takers in the grocery division. It is therefore undisputed in this proceeding that EEOC should receive nationwide data regarding the grocery division.

C. The Charges Received by EEOC Warrant a Systemic Investigation.

As discussed above, the Ninth Circuit recognizes that EEOC is entitled to company-wide data when investigating a Respondent's company-wide employment practices. *Fed. Ex.*, 558 F.3d at 854-56. McLane administers the PCE company-wide and nationwide in its grocery division. Resp. at 11. Ochoa's charge and the other charges filed under seal allege that McLane's use of the PCE causes broad systemic discrimination against women and disabled applicants and employees. Dkt 2-1, Att 1; Ex. 1; Ex. 2. Because the charges plainly raise the "specter of systemic discrimination,"

EEOC's nationwide investigation is proper. *Fed. Ex.*, 558 F.3d at 854-56.

McLane's arguments regarding the charges at issue are unavailing. First, an individual may file a charge of discrimination on behalf of herself or others. *See* 42 U.S.C. §2000e-5(b). Consequently, it does not matter whether pregnancy is a disability or whether Ochoa had a condition related to her pregnancy that substantially limited a major life activity. *Id.* Second, it does not matter that Ochoa worked for McLane Sunwest as opposed to McLane Companies, Inc. because McLane Companies uses the PCE throughout its facilities, including those of McLane Sunwest. *See Fed. Ex.*, 558 F.3d at 854-56. Finally, the cases relied on by McLane are distinguishable. In *EEOC v. Burlington Northern & Sante Fe R.R.*, the EEOC based its subpoena on charges that did not contain allegations of a pattern or practice of discrimination. 669 F.3d 1154, 1158 (10th Cir. 2012). Likewise, the charges discussed in *EEOC v. Packard Elec.* were individual complaints lacking systemic allegations. 669 F.2d 315, 316 (5th Cir. 1978). By contrast, the present Ochoa charge alleges violations of the ADA premised on the use of the PCE with "*all employees* returning to work from a medical leave and *all new hires, regardless of job position.*" Charge, Dkt 2-1, Att. 1 (emphasis added). In contrast with *BNSF*, EEOC has also provided the Court with

two additional charges containing systemic allegations, a declaration and subpoena, Exhs. 1 2, 3, 4 (under seal).[4]

III. McLane Fails To Demonstrate an Undue Burden

It is McLane's responsibility to demonstrate undue burden. *Children's*, 719 F.2d at 1428. Again, McLane fails to meet its responsibility.

A. Providing Names and Social Security Numbers of All Test-takers Is Less Burdensome Than Redacting That Information.

Names and social security numbers for all test-takers are readily available to McLane and can be easily produced because they are maintained in the IPCS database. McLane admits it withheld names and social security numbers when it produced the IPCS data to EEOC. Dkt, 9-10, Ex. E, at ¶8. It was more burdensome for McLane to withhold this information than to produce it. Indeed, it does not appear that McLane even argues that providing names and social security numbers would pose an undue burden.

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[4] McLane has previously received notice from EEOC since at least February 2012 that these charges are connected to the Commission's Ochoa investigation because the Commission has issued another Title VII/ADA subpoena regarding the IPCS test to McLane under all three charges. *See* Subpoena (Ex. 4) (under seal).

B. Providing Employee Contact Information, Dates of Hire, Dates of Termination, and Reasons for Termination Is Not Unduly Burdensome.

Most of McLane's arguments surrounding the burden of providing specific information is based on the fact that such information in [sic] not contained in the IPCS database, which is the database containing PCE test results. *See* Resp. at 13-16. McLane, however, maintains last known address, home phone, date of hire, job code, date of termination, and reason for termination in its PeopleSoft database. Worsham Decl., at ¶8 (Dkt 9-9). The PeopleSoft database contains this information for all employees but not for job applicants. *Id.* at ¶5. Thus, by cross referencing the two databases using social security numbers, McLane could easily provide, for all employees, contact information, dates of hire, positions held, dates of termination and reasons for termination. *Id.* at ¶8 (estimating 10-15 hours); Exh. 6, Wojtusik Decl. at 10. To the extent PeopleSoft contains other data that complies with or approximates EEOC's requests for information, McLane can easily provide this information as well. *Id.*

C. Providing Addresses and Phone Numbers for Applicants/New Hires Is Not Unduly Burdensome.

McLane's estimates of the burden to produce information related to applicants who are not in the PeopleSoft database exaggerates the personal time

required to provide the requested information and neglects to consider that outsourcing may be a more effective use of the company's resources[5]. To begin, contrary to the time consuming manual searches describe [sic] by McLane officials, a search of electronic applications could be accomplished in other far more expedient ways such as by exporting electronic content to an e-discovery platform. Exh. 6, Wojtusik Decl, at 11. If McLane is unwilling or unable to conduct such an export and search itself, it can enlist an e-discovery vendor to assist at a relatively low cost to the company. *Id.* at 12. Or it can enlist the support of EEOC's own e-discovery experts. *Id.* at 13. As for hard-copy applicants, it should take no more than a couple minutes to extract contact information from the application and plug it into the existing database of test-takers, a far cry from the 30 minutes estimated by McLane. *Id.* at 14. Or McLane could provide hard copy applications to EEOC so that it can locate relevant pedigree information itself. Whatever the situation, McLane fails to carry its burden to show undue burden.

IV. Conclusion

Although McLane attempts to muddy the water with various side arguments and accusations, this case boils down to whether the information requested by

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[5] Notably, McLane also fails to provide the Court with any estimate of McLane's financial resources from which the Court could evaluate monetary burden.

EEOC is relevant to the ADA and Title VII investigations. EEOC has shown relevance, and McLane has not met its burden of demonstrating that the information sought is overly broad or unduly burdensome. An order to show cause should be granted.

RESPECTFULLY SUBMITTED this 23rd day of October, 2012.

MARY JO O'NEILL
Regional Attorney

ANDREA G. BARAN
Supervisory Trial Attorney

s/ Meenoo Chahbazi
MEENOO CHAHBAZI
Trial Attorney

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[Certificate Of Service Omitted]

* * *

[Doc. 15-5]

EXHIBIT 5

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner vs. McLane Company, Inc. Respondent.	Case No. 2:12-mc-00081-PHX-GMS **SUPPLEMENTAL DECLARATION OF ELIZABETH CADLE IN SUPPORT OF APPLICATION FOR ORDER TO SHOW CAUSE WHY AN ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, Elizabeth Cadle, solemnly state as follows:

1. I am the Deputy District Director and the Systemic Coordinator of the Phoenix District Office of the Equal Employment Opportunity Commission ("EEOC"), and, in that role, I am responsible for the investigation of charges of employment discrimination for the EEOC Phoenix District Office. I have been with the EEOC for 37 years as an Investigator, Local Office Director, Enforcement Manager, and now as a Deputy Director. I am the Deputy Director for the Phoenix District Office of the EEOC and have responsibility for the investigation of charges in the states of Utah, Arizona, Colorado, New Mexico and Wyoming. We have three offices in our District, the District Office in Phoenix, a Field Office in Denver and the Area Office in Albuquerque. We are one of 15 EEOC District Offices in the country.

2. The Phoenix District Office is responsible for investigating charges wherein employers are alleged to have engaged in employment practices made unlawful by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), the Genetic Information Discrimination Act, 29 USC § 216(e) ("GINA"), The Equal Pay Act, 29 U.S.C. §206 ("EPA"), the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA").and the Americans with Disabilities Act of 1990 as amended, 42 U.S.C. §§ 12101 *et seq.* ("ADA").

3. I have examined our records and the Phoenix District Office EEOC has found cause in less than 7% of the charges of discrimination which it has completed during the last five years. The Phoenix Office issued 218 cause findings out of 3,364 resolutions for the fiscal year ending September 30, 2012, less than 7% of our resolutions.

4. In the Phoenix office alone (not including the charges in the Denver and Albuquerque Offices), the EEOC currently has 2,337 pending charges, and we currently have only 21 investigators to investigate those charges and the investigators are continuing to take in new charges every day. During the last fiscal year, the Phoenix Office received 3,194 charges and resolved 3,364 charges through investigation with a maximum of 26 investigators. We do not have the resources to pursue investigations where we do not discover evidence of discrimination.

5. If during an investigation of a charge, we uncover evidence of other possible violations like and related to the allegations in the current charge, it is our public duty to further investigate the like and related matters.

6. I have reviewed the files in this case. In our investigation of Damiana Ochoa's Charge, Charge No. 540-2008-01093, we have discovered evidence that McLane may have denied reasonable accommodations to individuals with disabilities who were asked to take a physical capability exam ("PCE"). We have also received two additional charges from former McLane

employees who allege that McLane's use of the PCE violated their rights under the ADA.

7. According to the information provided by McLane, since McLane started using the PCE test in the grocery division in March of 2005, more than 3,000 new hires or current employees in the grocery division may have been denied employment as an applicant or terminated as an employee after returning from medical leave because they could not pass the PCE.

8. In our investigation of Ms. Ochoa's Charge, we have also discovered evidence that individuals with disabilities are not taking the medical leave recommended by their doctors to address their medical needs, such as chemotherapy, because they are afraid they will be forced to take the PCE for the first time, that they will fail the PCE, and that they will then lose their jobs.

9. The EEOC acts in the public interest to prevent employment discrimination and attempts to investigate all claims of potentially aggrieved individuals who may have been discriminated against by an employer's policies, practices and/or procedures.

10. When the EEOC is investigating a Title VII or ADA charge, and finds a policy, practice, test, and/or procedure that may be discriminatory on the basis of age, the Commission may initiate its own directed investigation to further investigate age discrimination under the ADEA. That is what the EEOC did when it discovered evidence of age discrimination when investigating the Ochoa Charge—it initiated an ADEA

directed investigation to investigate potential violations of the ADEA. The EEOC reasonably believed that McLane's use of the physical strength test could have an adverse affect [sic] on older applicants and older employees attempting to return to work from a medical leave.

11. In the interest of efficiency for both the respondent and the EEOC, when the Commission is investigating more than one charge of discrimination against the same respondent regarding the same policy, the EEOC may and does conduct simultaneous, coordinated investigations of charges against the same employer.

12. When the EEOC sought to obtain information regarding both the Ochoa Title VII/ADA Charge and the ADEA Directed investigation in one request for information, the EEOC did so in the interest of efficiency, both for the benefit of McLane and for the EEOC. McLane heavily criticized the EEOC for "intermingling the investigations." However, this is a routine EEOC practice that enables the EEOC to work as a more efficient and effective law enforcement office.

13. After receiving complaints from McLane, the EEOC decided to separate the requests for information regarding the Ochoa Title VII/ADA investigation and the ADEA directed investigation and to issue separate subpoenas for the requested information. The subpoenas were issued on February 11, 2011 for ADEA and on February 15, 2011 for Title VII/ADA investigation.

14. McLane's allegation that the EEOC initiated the ADEA directed investigation to obtain information relating to the ADA/Title VII investigation is untrue and unfounded. The EEOC reasonably believed, and continues to believe, that McLane's use of the PCE may have an adverse impact on older applicants and older employees.

15. McLane argues that the EEOC initiated the age discrimination investigation because McLane objected to the August 24, 2009 coordinated request for information. (Dkt 9-9, Exhibit B, Stenson Decl. ¶¶ 9-10, Case No. 2:12-GMS-00615, Dkt 9, p. 2). But McLane did not raise any objections to the EEOC August 24, 2009 request for information. See November 13, 2009 Response, Dkt 2-1, Ex. A, Attachment 8. Additionally, McLane itself admits that the EEOC requested information regarding age discrimination in its August 24, 2009 RFI, which demonstrates that the EEOC was interested in investigating age discrimination before it sent out the August 24, 2009 request, before receiving McLane's response, and before the EEOC initiated an ADEA directed investigation on August 6. 2010. (Dkt 9-9, Exhibit B, Stenson Decl. ¶ 9).

16. The EEOC has additionally received a charge of discrimination from a former employee who alleges McLane discriminated against her and a class of individuals on the basis of age. *See* Ex. 2. The EEOC has also attached a declaration from a former employee who alleges that McLane's use of the physical strength test was discriminatory toward her and other older individuals, in violation of the ADEA. *See* Ex. 3.

17. The EEOC has also received additional information that supports its Title VII gender investigation. On September 5, 2012, McLane provided additional data to the EEOC regarding the test results for employees and new hires/applicants who took the PCE. The data provided by McLane included 15,941 entries of individuals who took the PCE, and provided the gender of 15,902 test-takers (39 of the entries did not include gender and/or test result). Of the 15,902 entries, 2,471 out of 4,123 females passed the test, and 10,384 out of 11,779 males passed test. The test passage rate for females is approximately 59.9% and the test passage rate for males is approximately 88.2%. Therefore, the pass rate for females is at a rate that is approximately 68% of the pass rate for males.

18. The EEOC has also found that the disparity between female and male test passage rates is statistically significant. Additionally, even when the EEOC adjusts the data for repeat test-takers by analyzing new hires, return to work, and transfers separately, the disparity is both statistically significant and the ratio of female to male test passage is less than four-fifths, demonstrating evidence of a violation of the four-fifths rule.

19. The four-fifths rule, which is also referred to as the 80% rule, states that the selection rate of the group in question should be at least 80% of the selection rate of the comparison group. In this instance, the ratio of female to male pass rates is 67.9 percent (59.9 percent divided by 88.2 percent). Since 67.9 percent is less than four-fifths (80 percent), the four-fifths rule

would suggest that the IPCS has an adverse impact on women.

Date: October 23, 2012. /s/ Elizabeth Cadle
Elizabeth Cadle

[Doc. 15-2]

EXHIBIT 6

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc., Respondent.	Case No. 2:12-mc-00081-PHX-GMS **DECLARATION OF TIMOTHY WOJTUSIK IN SUPPORT OF PETITIONER EEOC'S APPLICATION FOR ORDER TO SHOW CAUSE WHY ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

I, Timothy Wojtusik, pursuant to 28 U.S.C. 1746 hereby state and depose as follows:

1. I am a Litigation Support Manager for the Office of General Counsel of the Equal Employment Opportunity Commission. I work in the Phoenix District Office. I have served in that position since July 17, 2010. Prior to that I was an Information Technology Specialist for the Equal Employment Opportunity Commission in the Chicago District Office and served in that position since September 21, 2002.

2. As a Litigation Support Manager, I am responsible for the management of e-Discovery and electronic evidence processing. I am also certified by the International Society of Forensic Computer Examiners (ISFCE) as a Certified Computer Examiner (CCE) in

digital forensics, which means I have successfully completed and passed all testing requirements by the ISFCE Certification Board. As a member of the International Society of Forensic Computer Examiners, I am bound by the ISFCE code of ethics which means that I must comply with all legal orders of the courts and thoroughly examine all evidence within the scope of the engagement. It also means that I must not reveal any confidential matters or knowledge learned in an examination without an order from a court of competent jurisdiction or with the express permission of the client. Confirmation of my membership and certification and a complete list of ISFCE code of ethics can be found at ISFCE.com.

3. The Phoenix District Office recently requested my assistance in the above-captioned case because Respondent's attorney represented that Respondent was unwilling or unable to search for the information requested in the EEOC's McLane Subpoena re Ochoa, Subpoena No. Phx-11-32.

4. According to McLane, it uses human resource software called PeopleSoft. PeopleSoft is the industry leader in human resource software and was built with specific capabilities which enable users to effectively manage data through extraction, analysis, manipulation and reporting. See www.oracle.com/us/products/applications/pcoplesoft.

5. PeopleSoft is capable of providing users with data in many forms and comes with built-in functionality to query, export and report data from its databases.

6. PeopleSoft is an industry leading, state of the art integrated software package that provides a wide variety of business applications to assist in the day-to-day execution and operation of business processes. This software by design is engineered to manage, manipulate, and report on the data it holds. PeopleSoft has built- in functionality to query and report (Query Manager) on all data and to export that data into many types of formats, including comma delimited and excel. It is relatively easy to export data from PeopleSoft and is in no way burdensome to the user as McLane has stated. It should not be unduly burdensome for Respondent to query its PeopleSoft system for the name, addresses, social security numbers, phone numbers, dates of hire, dates of termination, position held, and code for the reason for termination of the employees who took the physical capability exam ("PCE") dating back to 2006. In fact, it should take no longer than an hour to obtain this data through a query.

7. According to Respondent, it employs the use of a Industrial Physical Capability Services (IPCS) (www.ipcs.inc.com) which provides physical capability testing. IPCS is a testing service; its website describes itself as providing "results driven by data."

8. Respondent has already provided some limited database information extracted from IPCS and

should be capable of providing further information which, at a minimum, includes the names and social security number of all test-takers, including all applicants/new hires who took the PCE. It should in no way be burdensome for IPCS to provide the names and social security numbers of Respondent's applicants/new hires who took the PCE. Again, databases are designed and used for the purposes of managing and reporting (exporting) on the information stored.

9. McLane's website (www.mclane.com) has an online electronic application system. The applications (see Exhibit A) request the applicant's name, address, and phone number. Just as with the IPCS website data, this information could be easily extracted and provided to the EEOC and would in no way be burdensome or costly. It will not be unduly burdensome for McLane to provide the addresses and phone numbers of applicants/new hires who applied online. If necessary, the EEOC is willing to make a complete copy of McLane's online applicant system data and perform the extraction of the appropriate data. Based upon my experience, I believe this extraction could be done in just a few hours if McLane would give the EEOC the native or raw database(s).

10. Since all of the above mentioned systems have the ability to export data in like formats, any data that is in the IPCS database, the McLane website, and the PeopleSoft database can be exported and merged to create one new comprehensive database(s). All that is required is a unique identifier common across these

databases (a "key" field), such as a social security number. Key fields and the use of a key field to merge separate databases is common place for database users and administrators. To merge the two databases is not particularly difficult and it can be accomplished in a few hours. Once accomplished, to find out who was terminated within 90 days of taking a PCE, McLane would just have to create a query or report condition to sort responses where test dates are less than 90 days from separation and the code for termination from the PeopleSoft database could be provided describing why an employee was terminated. The EEOC could do this exportation, merger and query across databases and produce a report if McLane gave the EEOC the native or raw databases. I believe it would take half of a day or less to complete, even if these are large databases.

11. In her Declaration, Melinda Sill describes only one way with in which data could be extracted from Respondent's Outlook e-mail system. The method she describes would be time consuming and burdensome. However, it is well known in the e-Discovery industry that there are, in fact, several ways of extracting e-mail and attachment information from email systems such as Microsoft Exchange and Outlook. For example, if Respondent has 21 human resource (see Sill Affidavit, p. 3, par. 6) custodians of records nationwide that have e-mail productions that pertain to this subpoena request, one simple and effective method to extract the information would be to export the entire contents of each custodian's mailbox and move those

exports to an e-discovery platform (such as Concordance or Summation or Ringtail) that are built and designed to search e-mail collections and consolidate data from same. The functionality to accomplish this is built into Microsoft Exchange\Outlook. Based upon my experience, I believe that exporting all of the custodian mailboxes can be done with tools that already exist within the Microsoft Exchange\Outlook system and would take on average less than an hour per mailbox.

12. A second method for extracting the needed e-mails from Outlook would be to consult with an e-discovery vendor that could assist with the process of extracting the e-mails and attachments and for which the costs are relatively low.

13. If absolutely necessary, the EEOC is willing to consult with Respondent on methods of extracting the needed information into useable formats and is willing to accept raw data that it can analyze, returning any privileged or non-relevant information to Respondent before it is viewed by Petitioner EEOC.

14. I am assuming that the vast majority of the 2,239 applications of applicants/new hires who did not pass the PCE and did not become employees are submitted online since there's an online application system and McLane discusses in detail the online applications it receives in the Sill Declaration. As described above exporting data from the online applications is a relatively simple and efficient process. Sill

also refers to Excel spreadsheets that contain additional information regarding applicants. Sill's Declaration does not clarify whether or not the phone numbers and addresses of new hires/applicants who failed the PCE are maintained on the Excel spreadsheets or entered into PeopleSoft or another database. To the extent new hire/applicant addresses or phone numbers for hard copy applicants are on any databases they can easily be extracted. For the remaining hard copy applications of new hires/applicants who took the PCE, it will not be unduly burdensome for McLane to enter phone numbers and addresses into the IPCS database/spreadsheet. I have reviewed a copy of Ms. Ochoa's hard copy application. (See Exhibit B). I believe it will take two minutes or less per new hire/applicant to enter this information onto an Excel spreadsheet from the hard copy application, if there is no online application or other databases that contain this information.

October 23, 2012 /s/ Timothy Wojtuski
Date Timothy Wojtuski

[Doc. 30]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc., Respondent.	)	No. CV 12-2469-PHX-GMS Phoenix, Arizona November 16, 2012 10:04 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE G. MURRAY SNOW

(Show Cause Hearing)

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[3] PROCEEDINGS

THE COURT: Thank you. Please be seated.

THE CLERK: This is miscellaneous case number 12-81, EEOC v. McLane Company, on for show cause hearing.

Counsel, please announce.

MR. RATLIFF: Good morning, Your Honor. This is Sean Ratliff on behalf of the Equal Employment Opportunity Commission, and with me is Mary Jo O'Neill.

MS. O'NEILL: Good morning, Your Honor.

THE COURT: Good morning.

MR. WOODARD: Good morning, Your Honor. Josh Woodard on behalf of respondent, and with me here this morning is Ellen Perlioni and Ashley

Kasarjian, also on behalf of respondent. And joining us today is respondent's corporate counsel, Kim Magyar.

THE COURT: All right.

Mr. Ratliff.

MR. RATLIFF: Good morning, Your Honor.

As we have not met before, my name is Sean Ratliff, and I am filling in for Meenoo Chahbazi, who has been on this case prior to myself.

THE COURT: Um-hum.

MR. RATLIFF: She's on an extended leave of absence and is expected to return, hopefully, next summer, so I will be [4] taking over in the meantime.

At issue in this case is subpoena number—

THE COURT: Let me just get right to the point.

MR. RATLIFF: Yes.

THE COURT: Pregnancy's not a disability, is it?

MR. RATLIFF: Not typically, no.

THE COURT: Is it in this case? Is there any allegation that pregnancy is a disability in this case?

MR. RATLIFF: Not that I am aware of. I believe that the charge that we're talking about, the

Ochoa charge, on its face alleges disability discrimination; however, on behalf of other people. And under the—

THE COURT: Can I allege disability discrimination on behalf of other people in front of the EEOC?

MR. RATLIFF: Yes, you may.

THE COURT: And is this Court allowed to determine whether or not the charge party—charging party can recover on that basis as part of whether or not the subpoenaed information is relevant?

Why couldn't I do that?

MR. RATLIFF: I'm sorry. Could you repeat that question for me?

THE COURT: Well, let's say you're pregnant.

MR. RATLIFF: Yes.

THE COURT: Let's say that McLane engages in a [5] procedure which you think discriminates against you based on your pregnancy, or maternity leave, or leave of absence, or whatever, related to your pregnancy. Okay. You do not have an ADA claim.

MR. RATLIFF: Not under most circumstances, Your Honor.

THE COURT: And you're not claiming that there exists one in this case.

MR. RATLIFF: At this point, the investigation is still underway. I don't know that a determination as to that—

THE COURT: You can't represent to me now that it does in this case.

MR. RATLIFF: At this point, I can't represent to you that, you know, there's a finding that her pregnancy would constitute a disability. However, an individual—disabled or not—is still, under our regulations and under the statute, allowed to make charges of discrimination on behalf of others. It's explicitly stated in the statute, Title VII.

THE COURT: Where in the statute?

MR. RATLIFF: That would be, I believe, Section 706(a) or (b). I'm not entire—I can't—

THE COURT: I'm sorry. Can you give me the title number?

MR. RATLIFF: Sorry. 42 U.S.C. 2000e dash—I guess [6] it would probably be 6.

THE COURT: 706(a) or (b).

MR. RATLIFF: I believe that is the case, Your Honor.

THE COURT: All right. And am I allowed—even if it is permitted for persons to make claims of discrimination on behalf of others when they are themselves not subject to such discrimination, we'll assume that for purposes of this case Ms. Ochoa is not subject

to disability discrimination, even though that could change, right now you're not representing to me that it has changed, am I allowed to consider that in determining the extent to which the subpoenaed information is relevant to the investigation of the charge?

MR. RATLIFF: To the extent that an individual can file a charge on behalf of other people, they do not have to be part of that protected class to do so, and the Court should look to the charge itself and to the investigation to determine whether or not the subpoena in this case is relevant.

THE COURT: But can I consider whether the person themselves can recover on behalf of the charge in determining whether or not the information sought is relevant or burdensome?

MR. RATLIFF: I don't believe that that should factor into the Court's analysis. I think that the case law—

THE COURT: Well, I understand that you wouldn't believe that it should factor in the analysis. Do you have any [7] case authority that suggests that it can't factor into the analysis?

MR. RATLIFF: I am aware of no case law that would say that because somebody is not part of the protected class themselves, that that somehow changes the relevancy dictates that—that the Ninth Circuit has enunciated, which is to look at the charge and to look at the EEOC's investigation to see if what we've asked for is relevant.

THE COURT: All right. I understand your point. You can proceed.

MR. RATLIFF: Okay. Thank you.

And in the—in that vein, I think that what the Court needs to consider here today is the face of the Ochoa charge as well as the investigation that the EEOC has currently conducted.

As you know, this is a case involving a physical capabilities test which tests people's strength in their legs and in their shoulders. During the course of our investigation the EEOC has learned that McLane applies this same test across all of its facilities. We've uncovered evidence that the IPCS, the third-party company that administers this physical capability test, markets the test not only as a way to determine whether or not people have sufficient strength, but also as a means to reduce obesity in the workplace.

We've learned that there are—the test itself [8] factors in people's weight, for example, in determining what—their scores on the particular test. They've produced, McClane has produced certain validation studies that the EEOC is still investigating, and the methodology there appears somewhat questionable, which is why we're looking into that.

We also have some evidence that the test is being applied discriminatorily. There's some e-mails out there talking about how the test should be applied to people who are considered overweight.

We've also, through this process, uncovered other charges of discrimination, which we attached to our reply brief. And so, really, at issue here is the—there's a handful of topics the EEOC still doesn't have responses from McLane on three years later.

Now, they have provided us with a number of the information that we requested in the subpoena. But there—the outstanding issues here are really what the Court has called pedigree information: people's names; people's Social Security numbers; last-known addresses; telephone number; medical condition, to the extent that they would know what that is; the date of hire and positions held; and the reasons for somebody's termination; in particular, whether or not they were let go or not hired because they couldn't pass the IP—

THE COURT: Do that with me one more time. Name. Social. Medical condition.

[9] MR. RATLIFF: Last-known address.

THE COURT: Okay.

MR. RATLIFF: Telephone number. Date of hire. The position they held. And the reasons for their termination. In particular, whether or not the termination was the result of a failure to pass the capabilities test.

So that's all we're talking about here in the subpoena enforcement procedure, and I think the parties and the Court can all agree that the framework that the Ninth Circuit has set out is fairly straightforward. The EEOC needs to show that we have the authority

to investigate the case; that we have met our procedure requirements; that the evidence is relevant; and in terms of relevance, Shell Oil dictates that we look at both the charge as well as the investigation the EEOC has conducted, and that that is not a particularly constraining analysis.

Once the EEOC shows those three things, the burden then shifts to the respondent to show either overbreadth or undue burden. And when we're talking about overbreadth, I think it's very important that the—the Court distinguish between EE—

THE COURT: Let me ask you this, on the overbreadth or the undue burden point: If I require the production of the name, the social, the last-known address, the telephone number, can't you get the rest of the information?

Why in the world should they provide you with medical [10] conditions?

MR. RATLIFF: Well, Your Honor, that is exactly why I think in this particular instance it's one of the reasons that we need the name and—and the last-known address, because they don't seem to have these.

THE COURT: I understand, but if they—if I were to require them to give you that, then why do you—and maybe I suppose that I might need to require them to give you whether or not the reason for their termination was their failure to pass the test, why, then, can't the EEOC take upon itself the burden of discovering the other information?

MR. RATLIFF: I think that absolutely, the EEOC could do that. To the extent that they had easily accessible documentation about people's medical conditions or disabilities and it wouldn't pose a burden on them, I think that that's also something that the Court should order in this case—

THE COURT: What about—

MR. RATLIFF: —but if they don't—

THE COURT: Relating to what I did earlier on the ADEA matter, if McLane wanted to incur the burden of giving you all this information without the name and the address but they wanted to incur the cost, what would prevent me from ordering that?

Then if you could demonstrate, based on identifying information—in other words, not name and address, but [11] employee number 1, 2, 3, however many—if they want to give you the information, if they want to incur the expense of giving you the information on an employee-by-employee basis, and then you can demonstrate, for example, under a gendered discrimination you can demonstrate that there is a possible disparate impact case, or you could demonstrate, based on an identified medical condition, a possible ADEA case, why, then, couldn't you come back and request the identity of persons who might be involved in such claims?

MR. RATLIFF: You know, Your Honor, I think that perhaps the EEOC has not done as good of a job as it could have explaining the reasons why we

need people's names and their contact information, and why we would want to talk to them in this particular instance. And, you know, I think the most obvious reason is—

THE COURT: Well, let me tell you my concern; I'll just lay it out there. I don't know—I appreciate that it's the EEOC's desire and job to enforce federal statutes to the full extent of its authority. But legislation is always, it seems to me, a bit of a compromise, and businesses I don't think are interested, and I'm not sure that Congress is interested, in allowing you to use these—to use discovery to, as I've otherwise indicated, troll for potential plaintiffs who aren't otherwise unhappy or undamaged, without demonstrating that you have a claim first, or some basis to [12] believe that you have a claim. My concern is balancing those two concerns. And it is true that the EEOC has yet to convince me, at least in the previous case, that the actual identities of the persons were either relevant or necessary to your stating the claim.

This case, as you've indicated, has a slightly different posture, it's one that is worth considering in that different posture, so explain to me—I've set forth two options for you. One is either they give you the names and addresses and the reason for termination and you incur the cost of doing the rest; or if they wish to incur the cost, they, on a numbered-employee basis, give you all the information you've sought without the names, addresses, and personally identifying information, pending your ability to demonstrate that you may have claims on behalf of these people.

So tell me—in the first scenario, if I give you the names and addresses, I assume you don't need to address that, because then you'll have the names and addresses and identifying information. Tell me why the second scenario wouldn't work, if that's what McLane wants to do, if they wish to incur that expense.

MR. RATLIFF: I'd be happy to.

Well, to the extent that McLane could provide us disability information, we'll just assume that they can—

THE COURT: Right.

[13] MR. RATLIFF: —in the second scenario.

THE COURT: Right.

MR. RATLIFF: In addition—

THE COURT: And we'll assume that that would cost them—I mean, they've already indicated, with some plausibility, that that would be a burdensome request. But I'll—I'll assume under my scenario that it's a request that they've opted to shoulder rather than to give you the identifying information.

MR. RATLIFF: I understand, Your Honor.

The reason that the EEOC needs to talk to these people, even if they—McLane were able to identify that they're disabled, is that this is—this is a case where we've got adverse impact allegations. McLane says that this test is equally applied to all employees. The

EEOC is not required to accept that statement at face value.

THE COURT: All right.

MR. RATLIFF: The only way we can iden—figure out—

THE COURT: But how does the individual identification of employees help you understand if this third party—I guess independent contractor—administers the test differently to different people?

Wouldn't a subpoena to that contractor about their test protocols be more—more along that line?

[14] MR. RATLIFF: I don't believe so, Your Honor. I think that it's important for the EEOC to be able to talk to actual people who took the test, whether they're men or women or disabled or not.

THE COURT: And I'm certainly not saying in my hypothetical that you couldn't. But I'm demonstrating that you would have to demonstrate that you have a case before I would—before I would consider the other information relevant, in terms of all the balancing that I have—that the Court is required to do, in balancing burdens and relevance, relevance considerations.

MR. RATLIFF: Well, I think, Your Honor, that the case law would indicate that—

THE COURT: What's your best case for the fact that I don't have such discretion?

MR. RATLIFF: Well, I'm not— I'm not indicating that the Court has no discretion. What I'm indicating is that—that relevance is determined by the charge at hand. The EEOC, in moving forward with a subpoena—

THE COURT: So I, as a third party who cannot state the charge on myself, on my own behalf, can raise any charge, and that gives the EEOC unbounded authority to investigate that charge, even though I can't possibly recover based on it? That's what you're telling me.

MR. RATLIFF: The EEOC's job is to enforce the federal [15] statutes against discrimination.

THE COURT: Right.

MR. RATLIFF: When we receive an allegation from somebody, that—that allegation, that charge, is a sworn statement.

THE COURT: I understand.

MR. RATLIFF: So—so when—

THE COURT: A sworn statement is a charge on which that person cannot recover, at least as it pertains to the ADA. It seems to me that she does have—she has stated a claim she can recover for based on gender discrimination.

And so I think it's clear that—that McLane is going to have to give you at least the gender information of the individual test-takers, but they've indicated to

me, if I understand the papers correctly, they've already agreed to do that, is that correct?

MR. RATLIFF: They've agreed to provide the EEOC and have provided the EEOC with the gender of test-takers.

THE COURT: In an individually identifiable way. So you're not—

MR. RATLIFF: We do not have contact information or names of anyone.

THE COURT: No, I know you don't have names or contact information, but they're saying: This is a female. Here are her test results, whatever else you're interested in.

[16] MR. RATLIFF: Correct. They have provided that, Your Honor.

So to get back to the issue of why the EEOC would need to talk to these people is to, one, figure out, you know, is this test being equally applied to all individuals? And without talking to actual people we can't do that.

Another reason would be to—

THE COURT: Why couldn't you—my question was, again: Why couldn't you find that out by subpoenaing information or doing an investigation of the—of the contractor that administers the test?

MR. RATLIFF: Well, I think that we—we certainly could talk to the contractor that administers

the test. I don't necessarily believe that that would provide us with a full perspective of what was going on.

And once again, when you're talking about the independent contractor, they have a vested interest in making sure that it appears that they, you know, apply this test equally, and we would need to talk to people to see if that's actually how it happens.

THE COURT: Okay.

MR. RATLIFF: We also need to talk to people, Your Honor, to look at things like the validity of this test in the first place. They've claimed that their test is valid, that it measures actual work functions. You know, it makes sense that [17] the EEOC would want to talk to people who actually perform these functions at their job to see if in fact this is the type of test that would measure what they do.

I mean, if the test measures, Can I lift 50 pounds, right? We would want to talk to somebody that does that job: Do you really have to lift 50 pounds? Right?

We may want to talk to people who have been out on leave: Why were you on leave? Were you on leave because of your pregnancy? Were you on leave because, you know, you were sick? Were you on leave to take care of somebody else? All this helps us figure out the whole picture of the story and what's going on.

The investigation doesn't end, and the analysis isn't dependent entirely upon whether or not there is a disparate impact. They have a—they have defenses of their own that talk about whether or not the test is job

related and consistent with business necessity. We have an obligation to see if the test is job related and consistent with business necessity.

Some of these people, our understanding is, have worked for this company far before there ever was this test. If they have done this job for 20 years, or 10 years, or whatever it is, and then all of a sudden McLane implements a test and they go out on leave, or they choose not to go out on leave, which is some of the evidence that we have, because [18] they're afraid that they won't be able to pass the test when they come back, and yet they're still doing their job right now, that would indicate to us that this—this test may not be job related.

And so I think it's very important for the EEOC, for a host of reasons other than to determine whether or not someone is disabled, which is, I think, the most obvious reason we would want to talk to people in this case, to want to talk to folks.

THE COURT: All right. Anything else?

MR. RATLIFF: I wouldn't mind addressing, if you—the burdensomeness argument that they've raised here.

According to their own declarations, Mr. Worsham's declaration, which is included in the record at 9-9, docket number, the IPCS database had Social Security numbers; it has people's names.

Their PeopleSoft database has peoples' names, their address, their phone number, their Social Security number, their dates of hire, their date of termination and the termination code, all information that is at issue here.

THE COURT: Well, I appreciate it, and I think I understand your point.

I am going to direct rather—a rather pointed question, I think, to Mr. Woodard, which will be: If it's burdensome, why not just give them the names? And then let [19] them do the—let you do the collection of other information.

MR. RATLIFF: That, I believe, Your Honor, would make sense, to give us the names.

To the extent that they're giving us names, they can take the Social Security numbers as unique identifiers in these two databases, and according to our experts that we've talked to that do a lot of work with databases, it only takes a matter of minutes, typically, and at most, if there's some glitches, a few hours, to merge databases if you have a common identifier like a Social Security number.

So to the extent that they have all of this information in PeopleSoft, which has a Social Security number, and all of this information is in the IPCS database as well, it should take little or no time, certainly not a burdensome amount of time, for them to merge those two databases.

I think where they have a little bit more of a stronger argument, probably, is with respect to the applicants, the folks that are not in their PeopleSoft database. But even there there's a problem, and that's that we're only talking about 2,239 applications.

THE COURT: I got that.

MR. RATLIFF: Okay. So their explanation is silent as to where these applications are, how they're maintained. We know that they have some online applications, and I would just put up for the Court here an exhibit—this is taken from [20] their online application system. And as—oh, that's not the wrong—that's the wrong one. Here we go. This one.

This is the online application system, and this is Exhibit A to Mr. Wojtusik's declaration, which we included with our reply.

As you can see, all this stuff is entered electronically. You know, the position that they applied for. Their names, their addresses, all of this stuff, the present home address, their Social Security number, all the things that we're asking for is already electronically maintained.

When you go onto an online system and you put in your application information, that's going into some sort of database. And according to their, you know, declarations, that thing gets sent out to the relative H—relevant HR manager.

So what they haven't explained is why can't you just go to this original database where all of this stuff

is being inputted, and again merge, based on these Social Security numbers the applicants put in there.

THE COURT: Okay. Anything else?

MR. RATLIFF: Well, in terms of paper applications, I would—I would argue the same thing. Even if everything was a paper application, their folks have estimated it would take 30 minutes. This is their paper application. Once they pull an application, they have the home address; they have the Social Security number. All that stuff is right on the face. [21] It doesn't take 30 minutes to look at that and code it into a database.

And moreover, even if they didn't want to do that themselves, we've done a little research with our, you know, IT folks and whatnot, and apparently you can have a third-party vendor come in and code that type of information into a database for you for, like, 25 or 35 cents a page. Even if all 2,200 applicants were in a hard copy we're talking about a few hundred dollars, hardly something that would seem burdensome for a company, especially when they haven't even told us, you know, you're supposed to weigh, in terms of burden, the resources versus the cost. They've said nothing in terms of their burden about what their resources are, Your Honor. So I just—we would contend that they have failed, in many ways, to even articulate how this would be burdensome.

THE COURT: Okay. Thank you.

Anything else?

MR. RATLIFF: At this point, no, Your Honor. I'm happy to answer any other questions that you might have, though.

THE COURT: All right. I'll give them to you if I have them.

Mr. Woodard.

Even if Ms. Ochoa can't personally recover under the ADA, she can raise an ADA claim, and that does give, since it's [22] raised on its face, it does give the EEOC power to investigate the claim, doesn't it?

MR. WOODARD: We don't believe so, Your Honor. If that were the standard, the EEOC could toss any given protected class status in there, whether or not the people was included in that protected class status. In other words, there's no aggrieved party here.

THE COURT: All right. And I'll look at that pretty carefully. I am going to check the cases and read them myself after today's hearing's over to determine what the appropriate scope of the investigation is.

If, however, I determine that—well, is there any dispute about the fact that Ms. Ochoa did make an ADA complaint to the EEOC? On its face?

MR. WOODARD: The charge on its face does include an allegation that the PCE violates the ADA.

THE COURT: Okay.

MR. WOODARD: She does not—oh, I'm sorry, Your Honor.

THE COURT: That's all right. Go ahead.

MR. WOODARD: She does not claim that her pregnancy amounted to a disability. I know the Court had some initial questions. In fact, if you look at the charge itself, they only list pregnancy under the Title VII violation.

THE COURT: And I'm going to look at that. I do have [23] some concerns about it, for the reasons that I—that I previously discussed with Mr. Ratliff.

But if in fact I determine that under the Ninth Circuit, the mere fact that she has stated the claim on its face, even though she doesn't have the right to recover, still gives the EEOC power to investigate it, and I am going to look at that carefully, then to the extent that you can't—and I understand why you can't necessarily know what the medical conditions of the test-takers are, why isn't it relevant for the EEOC to have the names of those who have taken the test so that they can ascertain if in fact they had medical conditions?

MR. WOODARD: The ADA does not lend itself well, especially in this instance, to a disparate impact analysis, Your Honor. The EEOC has never articulated any theory what type of medical condition are we talking about? Are we talking about somebody who's been out for 30 days due to pneumonia?

Due to a ski accident? Due to mental depression? Due to cancer treatment? It could be a whole host of things. This is a highly individualized analysis that

you must go through. It really falls into—this particular case falls into a disparate treatment issue.

Now, this is not a case, Your Honor, where the policy says, Hey, if you've ever had cancer you can't take the evaluation; or, If you have trouble hearing or seeing, you can't undergo the evaluation. We could have a different [24] discussion on that issue.

Here, when you look at it, on a disability you have to figure out whether the person's disabled; whether McLane knew about it; whether there's a reasonable accommodation; whether that reasonable accommodation was supplied; and whether they could perform the essential functions of the job.

To just canvass the nation for, quote, medical condition, that's a highly individualized analysis. And when you go back to the face of the charge, and in the EEOC's reply, they indicate that this evaluation is given to every employee. And their reply says it's a rigid and uncompromising evaluation given to the employees.

When you look at that, that is by its very nature, under the Raytheon case, this is a disparate impact charge that they've brought. There's no allegation that any individual has a disparate treatment charge. This is a disparate impact charge and so we have to treat it as such.

Now, with respect to the Title VII issues, just so the Court is clear, McLane has produced all the information that the EEOC needs in order to run a disparate impact analysis. They have—

THE COURT: In terms of Title VII.

MR. WOODARD: Yes, Title VII.

THE COURT: Um-hum.

MR. WOODARD: They have gender; test dates; reasons [25] for test; the results of the test; an adverse action that occurred within 90 days, consistent with the Court's ADEA order.

So if this is a disparate impact case under

Title VII—I'll get to ADA in just a second. If it's a disparate impact case under Title VII, the EEOC has everything it needs.

Now, consistent—staying with Title VII, Your Honor, if this is a disparate treatment Title VII case, one, there's no allegations on the face of the charge that Ms. Ochoa had to take the test but her colleague, who's a male, did not have to take the test, or Ms. Ochoa had different strength requirements than her male colleague; there's no allegation that this is a disparate treatment.

But even assuming that there is, that's a highly individualized analysis. You have to go identify the motives of the decision makers out at SunWest. That does

not give the EEOC carte blanche authority for nationwide pedigree. They don't need it on a disparate treatment test, and they don't need it on an disparate impact. So no matter how you get there under Title VII, they don't need the pedigree information.

Moving now to the AD—ADA—

THE COURT: Well—

MR. WOODARD: —this is—

THE COURT: —what you're really suggesting, isn't [26] it—well, I've got to look at the face of the charge, right?

MR. WOODARD: That's a logical place to start, because I think the EEOC's authority arises out of the allegations in the charge itself.

THE COURT: All right. So the charge says something about—although the charge raises concerns about the pregnancy, it also says something about the ADA in connection with that leave because of pregnancy.

MR. WOODARD: It does not, Your Honor.

THE COURT: Well, it can be inferred, fairly inferred?

MR. WOODARD: I don't believe so.

THE COURT: Well, if it is fairly inferred, even if it's fairly inferred to be a—and I guess I would

be inclined to fairly infer that it relates to a—an allegation that pregnancy is a disability, and to the extent that pregnancy isn't a disability under the ADA they've raised no charge, your point is that if we were to treat this as a violation of the ADA no matter what the disability, then the investigation is completely unfocused, and so you can't even distinguish between whether or not it is a disparate impact or a disparate treatment claim.

Is that what you're saying?

MR. WOODARD: Yes, Your Honor, that is. There is no focus, and so what medical condition are they looking at? Even assuming that information's available, which I [27] think is a—an unfounded assumption—

THE COURT: So if I were to reasonably infer that she's claiming that her pregnancy is the disability—all right. I think I see where—what you're saying. Go ahead.

MR. WOODARD: Just to further that point, Your Honor, the disability is not an immutable characteristic like age, gender, or race. And once you start getting into individualized assessments of somebody's medical conditions, and whether or not it's a disability, and whether or not there's a failure to accommodate, that takes it out of the realm of the disparate impact and it goes into a disparate treatment. And the—

THE COURT: I think I'm understanding your point on this. Is there anything else you want to say on it?

MR. WOODARD: Not on that particular point, Your Honor, other than it appears—well, even the EEOC recognizes in its—in its pleadings that the disability issue is a disparate treatment case. And if they don't have alleged victims, that's what they're doing, they're trolling for them. And we think it's just overreaching, and it doesn't relate to the allegations in the charge, which is where their authority stems.

THE COURT: All right.

MR. WOODARD: I'll be pleased to address any burden questions that the—

[28] THE COURT: Well—

MR. WOODARD: —Court may have.

THE COURT: —if in fact, after I look at this, I determine that the nature of the charge allows the EEOC to investigate all cases of possible ADA claims, whether they be disparate impact or disparate treatment, why wouldn't it be best, in terms of the burden analysis, for me to simply say: Provide them the name, the Social Security number, the last-known address, if you have it, and if the reason for their termination was their failure to pass the test, you have to so designate. And then the EEOC can bear the rest of the burden of researching the other categories of information that they've requested.

What would be burdensome about that?

MR. WOODARD: Well, we can go through each of those. The names of employees, McLane has ready access to that. Not much—

THE COURT: There are about 2,000 that you don't have that are—that you never hired.

MR. WOODARD: That's correct. And those names are not easily obtained.

THE COURT: Okay. You heard Mr. Ratliff talk about the electronic application system, the hard copy application system. You've got 2,000 of those. Why would that shut down McLane to provide just the name and the last-known address from [29] those folks?

MR. WOODARD: A couple reasons. One, I wouldn't suggest it would shut down McLane, for sure. But I would suggest that not all 21 locations of McLane have online applications. There are some online applications. However, that does not go into any central database. In addition, it's not searchable.

So in addition to hard copy files kept in—in up to 21 different ways, although I'm not representing that to the Court, several different ways out across the country not readily accessible, some online applications, they're not housed in a central repository online anywhere, and they're not searchable. So there is—there is quite a bit of burden with respect to getting applicant names.

The far harder one, Your Honor, is the medical condition. That, you'd have to cull through 15,000 files.

THE COURT: Well, again, it wouldn't be your burden to figure that out; it would be the EEOC's burden to figure that out.

MR. WOODARD: Well, and it gets—and I understand the Court said, Assuming the Court finds this, this, and this. But again, if they've—if it's not a disparate impact analysis, they're doing nothing more than searching for victims. And imagine—

THE COURT: I understand, but I'm—but you're right: [30] I've taken that off the table in my hypothetical and I've assumed that I've found this, this, and this.

If you assume that I found that, doesn't it remove a significant part of the burden from you if I simply say: Disclose the name, the last-known address, and for those who you employed, if the reason for their termination was the failure to pass this test, you need to disclose that, EEOC has to find everything else out, why would it be burdensome for you to do that?

MR. WOODARD: That would be less burdensome, I agree, Your Honor, assuming we could get those names, addresses, and telephone numbers, and it could shift the burden, assuming all those factors have been found.

THE COURT: Okay. Anything else you have to add?

MR. WOODARD: Not at this time, unless the Court has further questions.

THE COURT: No, thank you.

Mr. Ratliff, do you have anything else more you'd like to say?

MR. RATLIFF: Briefly, Your Honor.

I listed off a number of the outstanding issues here, and I will just say that the EEOC will be more than happy to do the work ourselves in determining disability if they provide us with the name, Social Security number, last-known address, telephone number, and the reasons for their termination, all [32] stuff that is maintained on their electronic PeopleSoft database.

And for the applicants, even assuming—let's just assume for a moment—and they haven't proven this in any way, shape, or form through the declarations—that everything was in hard copy, and they were all spread out over 20 facilities, they have the names and the IPCS—

THE COURT: I'll tell you, just so—to save you the time, if I—

MR. RATLIFF: Okay.

THE COURT: —find that you're entitled to do this kind of a detailed analysis, the 2100 or so non-unemployed people is not going to convince me that there's enough of a burden that they don't have to comply. Okay?

MR. RATLIFF: Well, then I will stop there.

THE COURT: All right.

MR. RATLIFF: The one other thing that I would address is when talking about whether or not someone can bring a charge on behalf of other people, the Court may also want to look at the FedEx case from the Ninth Circuit.

THE COURT: I am going to look at it. You did cite it. I'm going to look at it carefully. But it does strike me—and I'm going to give you the last chance to address this—as Mr. Woodard made the point in his oral argument, I mean, how can I really construe this other than being—even [32] if I give it a liberal construction, it's a liberal construction that pregnancy constitutes a disability, and—if I give the complaint a liberal construction—therefore, you've done—you've disparately treated pregnant women even with a liberal construction.

So wouldn't I have to limit the charge to one of pregnancy and not open it up to every possible disability that an employee might make against McLane?

MR. RATLIFF: No, Your Honor, for two reasons. The statute allows somebody to assert a violation on behalf of other people. The person asserting the violation does not have to be part of that—

THE COURT: And what about that complaint tells me that Ms.—

Is it Ochoa?

MR. RATLIFF: Yes.

THE COURT: —is asserting a general claim of disability discrimination no matter the disability on behalf of any McLane employee?

MR. RATLIFF: Well, I think, Your Honor—

THE COURT: Let me see the face of the charge, please.

MR. RATLIFF: Here is the face of the charge, Your Honor. I'll put it up. Clear it here.

That last paragraph, The physical capability strength test is given to all employees returning to work from a medical [33] leave and all new hires, regardless of job position, I believe the test violates the Americans with Disabilities Act as amended.

So she is asserting this not on behalf of just herself; most of her individual claims are contained in these paragraphs. She has included a separate paragraph here which asserts a systemic violation under the ADA. And so she has brought that just as the plaintiff in the FedEx case, who was an African American, asserted violations based on national origin on behalf of Hispanic employees, she's done the same thing here. She's asserted a violation on behalf of other people that she believes are being affected by this PCE.

THE COURT: Okay.

MR. RATLIFF: Thank you, Your Honor.

THE COURT: Thank you. I'm going to look at this very carefully. I don't know when I'll issue a ruling but it won't be too terribly long. Thank you.

MR. RATLIFF: Thank you.

MR. WOODARD: Thank you, Your Honor.

(Proceedings concluded at 10:46 a.m.)

RECORD AND BRIEFS

No. 15-1248

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a district court's decision to quash or enforce an EEOC subpoena should be reviewed *de novo*, which only the Ninth Circuit does, or should be reviewed deferentially, which eight other circuits do, consistent with this Court's precedents concerning the choice of standards of review.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption of this petition contains all parties to the proceedings.

Petitioner McLane Company, Inc. (McLane) is a nonpublic, wholly owned subsidiary of Berkshire Hathaway Inc. Berkshire Hathaway Inc. is publicly traded on the New York Stock Exchange.

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OPINIONS BELOW

The order of the court of appeals denying *en banc* rehearing (Pet. App. 34) is unreported. The opinion of the court of appeals (Pet. App. 1-17) is reported at 804 F.3d 1051. The order of the district court (Pet. App. 18-34) is unreported but available at 2012 WL 5868959.

STATEMENT OF JURISDICTION

The court of appeals filed its order denying *en banc* rehearing on January 22, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the EEOC's investigative authority under 42 U.S.C. § 2000e-8(a):

> **Examination and copying of evidence related to unlawful employment practices**
>
> In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

Section 2000e-9 of Title 42 of the United States Code adopts the procedures applicable to the National Labor Relations Board:

> **Conduct of hearings and investigations pursuant to section 161 of Title 29**
>
> For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

Section 161 of Title 29 authorizes the agency to issue subpoenas and seek enforcement in court:

> **Investigatory powers of Board**
>
> For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—
>
> **(1) Documentary evidence; summoning witnesses and taking testimony**
>
> The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production

of any evidence in such proceedings or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) Court aid in compelling production of evidence and attendance of witnesses

In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring

> such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

STATEMENT

Decisions by district courts about whether to enforce administrative subpoenas require fact-intensive, case-specific determinations, which should receive deference on appeal. Following this Court's precedent, all circuits (save the Ninth) to have considered the issue have correctly held that these decisions are reviewed deferentially. And the government has now declined to defend the Ninth Circuit's *de novo* standard. See Letter from Ian Heath Gershengorn, Acting Solicitor General, U.S. Dep't of Justice, to Honorable Scott S. Harris, Clerk, Supreme Court of the United States (Nov. 2, 2016).

This case illustrates exactly why deferential review is appropriate. The district judge was intimately familiar with: (i) the facts alleged in the charge filed with the EEOC; (ii) a previous subpoena enforcement action in the same case; (iii) the parties' conduct through the litigation process; and (iv) the EEOC's evolving theories of purported relevance.

As other circuits have recognized, appellate courts working from a cold record are not as well situated as district courts to evaluate key issues related to enforcement decisions. These issues include determining whether: (i) an agency's stated rationale for subpoenaed information is pretextual or authentic; (ii) the subpoena is for an improper purpose; or (iii) the subpoena is unduly burdensome. In this case, the shifting bases for the EEOC's pursuit of the same information provided the district court with a potent clue that the information the EEOC seeks is not relevant to the filed charge it is now investigating.

The Ninth Circuit disregarded the district court's expertise and reviewed the fact-intensive relevance determination *de novo*, with no deference to the district court's analysis or its closer understanding of the case. And even if the Ninth Circuit were correct that the district court applied the incorrect legal standard, it should have remanded to the district court to exercise its discretion under the correct standard.

The judgment below should be reversed.

1. McLane is a leading supply-chain services company that buys, sells, and delivers consumer products to businesses across the United States, including convenience stores, drug stores, and mass merchandisers. JA 446, 449, 456.

Many of McLane's employees work in physically demanding positions. To ensure these employees have the physical capability needed to safely perform the essential functions of their positions, McLane requires

every employee newly hired for a physically demanding position and every employee returning to a physically demanding position from leave in excess of 30 days to take a physical capability evaluation. Pet. App. 3.

The evaluation—which tests, among other things, range of motion, resistance, and speed—is designed, administered, and validated by a third party, Industrial Physical Capability Services (IPCS). JA 365 & n.1. The evaluation is completely objective—it is an isokinetic evaluation measured by a machine. *Id.* at 365. McLane is not involved in any way in the administration or scoring of the evaluation. Nor does McLane determine the rating needed to successfully complete the evaluation. That is done by IPCS in conjunction with third-party ergonomic experts, General Management Solutions, Inc. *Id.* at 70 n.2, 71, 365 & n.2.

2. Damiana Ochoa worked for McLane Sunwest, McLane's Arizona distribution center, for more than eight years as a cigarette selector, JA 42, a physically demanding job that involves lifting, packing, and moving totes. After Ochoa took maternity leave from August until the end of October 2007, McLane informed her that she would have to meet the minimum requirements on the physical capability evaluation to return to work. *Ibid.* After Ochoa failed to demonstrate the minimum physical capability for her position three times—twice in November and once in December—she was terminated. *Ibid.*

3. Ochoa filed a charge of discrimination with the EEOC alleging a belief that she had been discriminated against in violation of Title VII of the Civil Rights Act because of her sex and pregnancy. JA 41-43. The charge alleges:

> On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (Physical Capability Strength Test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007 and December 28, 2007, I retested and did not pass. I have worked for the above-named employer for over 8 years as a cigarette Selector.
>
> I believe I have been discriminated against because of my sex, female (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> The Physical Capability Strength Test is given to all employees returning to work from a medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended.

Id. at 42-43.

Neither Ochoa nor the EEOC has ever suggested that the policy is selectively enforced based on sex or pregnancy. On the contrary, the charge makes clear

that every employee returning from medical leave and every new hire takes the evaluation. *Id.* at 43. And although the charge references the ADA, Ochoa has never alleged that she was disabled. *Ibid.*

4. In 2009, the EEOC expanded the scope of its investigation far beyond Ochoa's individual sex-discrimination charge. JA 365-66. The EEOC sought nationwide information about all McLane facilities, business divisions, and related entities, even though Ochoa only worked for McLane's Arizona grocery-distribution center. *Id.* at 366, 380, 385. McLane gave the EEOC information consistent with the scope of the charge and objected to the requests for irrelevant matters. *Id.* at 366, 393-94; Pet. App. 21.

In response, the EEOC threatened to further expand its investigation into "nationwide compliance" with the Age Discrimination in Employment Act (ADEA) by McLane-related entities across the country. JA 367. The EEOC sought the personal information of every individual who had taken the evaluation nationwide for McLane—more than 14,000 people. Pet. App. 20; JA 233, 393-94.

The personal information sought by the EEOC included "pedigree information" such as each individual's name, sex, date of birth, Social Security number, and contact information. Pet. App. 20; JA 385-90. The EEOC also requested that McLane provide the reason each person took the evaluation, the score on the evaluation, and any adverse employment action taken based on evaluation performance. Pet. App. 20. Lacking an actual charge of age discrimination to justify

these expanded requests, the EEOC added an additional charge number—but no actual charging party—to its request for the pedigree information. JA 367, 369-70.

The EEOC did not point to any evidence that led to this expanded investigation, and no evidence of age-related discrimination had been provided to the EEOC. (Ochoa herself was under 40 years old at the time.) *Ibid.* The stated justification for the EEOC's request for pedigree information was that the EEOC was "looking for 'victims.'" *Id.* at 370.

5. McLane sought to cooperate with the EEOC and requested a meeting to work out a possible compromise. JA 370. Instead, the EEOC issued two virtually identical subpoenas. *Id.* at 371. One related to the Ochoa charge (the Ochoa Subpoena). *Id.* at 41-43, 92-94. The other related to the ADEA charge number that lacked any charging party (the ADEA Subpoena). *Id.* at 169-71, 371. Both subpoenas requested the same pedigree information for over 14,000 people. *Id.* at 233.

McLane responded by providing substantial information but without waiving its objections. *Id.* at 321-34. Although Ochoa only worked at McLane Sunwest, McLane produced information about all grocery applicants and employees who had taken the evaluation nationwide. For each person, McLane provided: (1) a unique identification number; (2) job location; (3) sex; (4) reason for taking the evaluation; (5) job sought; (6) physical capability achieved; and (7) whether that capability met the minimum requirement for the job sought. *Id.* at 310-11.

6. Despite McLane's extensive production, the EEOC sued to enforce the ADEA Subpoena. After briefing and a hearing on the EEOC's requests and McLane's objections, the district court enforced the ADEA subpoena in part, exercising its discretion to balance the EEOC's authority to investigate with the jurisdictional limit on that authority set by the scope of the charge. *EEOC* v. *McLane Co.*, No. CV-12-615-PHX-GMS, 2012 WL 1132758, at *5-7 (D. Ariz. Apr. 4, 2012). The district court concluded that the EEOC's stated scope of investigation—to determine whether the evaluation represents a tool of age discrimination in the aggregate—warranted nationwide statistical data. *Id.* at *5.

The district court upheld, however, McLane's objection to the EEOC's request for personal pedigree information for the approximately 14,000 people who have taken the evaluation. *Id.* at *7. The district court also determined that providing information about why any particular employee who took the evaluation was terminated created an undue burden. *Id.* at *6. The district court did order McLane to produce information about whether any person who took the evaluation suffered an adverse employment action within 90 days of taking the evaluation. *Ibid.* McLane complied and the EEOC abandoned the unfulfilled requests for information in the ADEA Subpoena. JA 232-33; Pet. App. 5 n.1.

7. The EEOC then sued a second time in the same district court to enforce the Ochoa Subpoena. Pet. App. 5. This time, the EEOC claimed that it needed the pedigree information to investigate ADA

violations (despite the fact that Ochoa is not disabled) by contacting each person who had taken the evaluation to see if they were disabled and if they would otherwise have been qualified to do the job they sought. JA 21-22, 466-71.

McLane again argued that the pedigree information sought was not relevant; that producing the pedigree information would impose an undue burden; and that analyzing thousands of files to produce the reasons for termination of anyone who had taken the evaluation was an undue burden. *Id.* at 211-27.

The district court enforced the Ochoa Subpoena to the same extent it enforced the ADEA Subpoena. Pet. App. 32-33. The court again compelled McLane to produce nationwide statistical data concerning every single evaluation participant, but declined to order McLane to provide nationwide pedigree information. *Id.* at 32.

The district court determined from "the EEOC's filings and the discussion at the hearing" that "the primary motivation for obtaining the pedigree information related to the ADA charge * * * [and was] not relevant * * * to a determination of whether the [evaluation] systematically discriminates on the basis of [sex]." *Id.* at 28-29. Restating its earlier ruling on the ADEA Subpoena, the district court held that the pedigree information "simply could not 'shed light on' whether the [evaluation] represents a tool of [sex] discrimination in the aggregate." *Id.* at 29.

Because the district court refused to enforce the subpoena of the pedigree information on relevance grounds, the court did not address McLane's arguments that producing pedigree information would impose an undue burden.

8. The EEOC appealed the district court's partial denial of the Ochoa Subpoena to the Ninth Circuit. Pet. App. 2. On appeal, the EEOC abandoned the ADA investigation and argued only that it needed the pedigree information to investigate whether individuals had been subject to sex discrimination. *Id.* at 5-6 n.1.

9. The Ninth Circuit reversed—candidly admitting that it was unclear why it applies a *de novo* standard of review to district-court determinations concerning administrative subpoenas while other circuits review those determinations for abuse of discretion. Pet. App. 8 n.1 (citing *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 295 (3d Cir. 2010); *EEOC* v. *United Air Lines, Inc.*, 287 F.3d 643, 649, 654 n.6 (7th Cir. 2002)). The Ninth Circuit recognized the inconsistency of applying *de novo* review when "[i]n a similar but related context—issuance of a protective order restricting the scope of an administrative subpoena—we have said that review is for abuse of discretion." *Ibid.*

Applying the *de novo* standard nonetheless, as Ninth Circuit precedent required it to do, the panel reached the opposite conclusion from the district court and compelled production of the pedigree information—holding that the information was relevant to the EEOC's investigation of Ochoa's charge. *Id.* at 10.

Without referencing the actual language of the charge or discussing the facts of the administration of the evaluation, the Ninth Circuit concluded that the charge could be interpreted as either a disparate impact or a disparate treatment claim—and in the Ninth Circuit's view, the pedigree information was relevant because it could assist the EEOC in investigating sex discrimination. *Id.* at 10-14.

After the Ninth Circuit denied a petition for rehearing *en banc*, *id.* at 34, this Court granted certiorari.

SUMMARY OF ARGUMENT

The panel was right to question why the Ninth Circuit stands alone in reviewing *de novo* the decisions of district courts regarding the enforcement of administrative subpoenas. Every other circuit that has addressed the issue has held that more deferential review is appropriate.[1] As those courts have recognized, that conclusion is virtually compelled by this

[1] See, e.g., *FTC* v. *Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 148 (D.C. Cir. 2015) (abuse of discretion); *EEOC* v. *Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 760 (11th Cir. 2014) (per curiam) (abuse of discretion); *EEOC* v. *Randstad*, 685 F.3d 433, 442 (4th Cir. 2012) (abuse of discretion); *Kronos*, 620 F.3d at 295 (abuse of discretion); *EEOC* v. *Technocrest Sys.*, 448 F.3d 1035, 1038 (8th Cir. 2006) (abuse of discretion); *NLRB* v. *Am. Med. Response, Inc.*, 438 F.3d 188, 193 (2d Cir. 2006) (clear error); *EEOC* v. *Dillon Cos.*, 310 F.3d 1271, 1274 (10th Cir. 2002) (abuse of discretion); *United Air Lines*, 287 F.3d at 649 (abuse of discretion or clear error); *EEOC* v. *Roadway Express, Inc.*, 261 F.3d 634, 638 (6th Cir. 2001) (abuse of discretion); *EEOC* v. *Packard Elec. Div., Gen.*

Court's precedents, which require deference to district courts on discovery and subpoena issues as a quintessential exercise of district-court discretion. See, e.g., *Pierce* v. *Underwood*, 487 U.S. 552, 562 (1988) (observing that review for abuse of discretion is appropriate when a question "involve[s] multifarious, fleeting, special, narrow facts that utterly resist generalization" (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 662-63 (1971))). Indeed, the Acting Solicitor General recently notified the Court that the government would not defend the Ninth Circuit's use of the *de novo* standard. Letter, Nov. 2, 2016.

Deferential review in this area makes sense because trial courts can better assess parties' needs, the veracity of their explanations, the resources they have (or have not) expended, and a host of prudentially significant facts that inform judgments about subpoenas and discovery issues. See, e.g., *United States* v. *Nixon*, 418 U.S. 683, 702 (1974) ("Enforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues."). Even the Ninth Circuit has recognized as much in other contexts. See, e.g., *United States* v. *Sealed 1, Letter of Request for Legal Assistance from the Deputy Prosecutor Gen. of the Russian Fed'n*, 235 F.3d 1200, 1206 (9th Cir. 2000)

Motors Corp., 569 F.2d 315, 317-18 (5th Cir. 1978) (abuse of discretion). In this context, the "clear error" and "abuse of discretion" standards are functionally equivalent.

(applying abuse-of-discretion standard to foreign tribunal document requests under 28 U.S.C. § 1782 because "district courts are in the best position to review the details of the request and to determine whether judicial assistance is justified"). So have other courts. See, e.g., *Gile* v. *United Airlines, Inc.*, 95 F.3d 492, 495 (7th Cir. 1996) ("A district court is in the best position to decide the proper scope of discovery and to settle any discovery disputes.").

Institutional competence, in particular, cuts strongly in favor of deferential review of EEOC subpoenas—again, as every other court of appeals considering the issue has concluded. Questions of motive, relevance, and comparative burden are the stuff of which trial-court judgment is made. The Ninth Circuit panel here recognized as much by citing closely related circuit law: "In a similar but related context—issuance of a protective order restricting the scope of an agency subpoena * * * review is for abuse of discretion." Pet. App. 8 n.1 (citing *McLaughlin* v. *Serv. Emps. Union*, 880 F.2d 170, 174 (9th Cir. 1989)). That the Ninth Circuit reviews an order modifying an EEOC subpoena *de novo*, while reviewing an order entering a protective order relating to an EEOC subpoena for abuse of discretion, is a conundrum that only underscores the illogic of the Ninth Circuit's position.

The practical consequences of modifying or quashing a subpoena also militate in favor of an abuse-of-discretion standard. The EEOC has numerous alternative means to gather additional information if its subpoena fails—including filing a broader charge

of its own, through which it may subpoena more information. So the consequences to the EEOC of nonenforcement are correspondingly minor. See, e.g., *Harman* v. *Apfel*, 211 F.3d 1172, 1177 (9th Cir. 2000) (noting as to a determination whether a remand in a Social Security benefits case should be for further proceedings or for immediate payment of benefits that "[w]hile we do not minimize the impact of continued delay in the payment of deserved benefits, the potential for 'substantial consequences' here is not so paramount as to dictate the application of *de novo* review unless other factors also point in that direction" (quoting *Pierce*, 487 U.S. at 563)).

This case illustrates precisely why abuse of discretion is the correct standard of review. The district court examined the EEOC's requests and held multiple hearings on the subpoenas. In applying the law to the facts, the district judge was able to consider the language of the charge against the agency's evolving theories of relevance to obtain the pedigree information. The information sought by the EEOC is not relevant to the filed charge it is investigating and the district court could see that from more than just the language of the charge.

For all these reasons, the Court should hold that the Ninth Circuit erred in reviewing the order here *de novo*, and remand for the court of appeals to apply the correct legal standard in the first instance. Under the deferential standards applied by the other courts of appeals, the EEOC would have had to demonstrate that the district court abused its discretion (or clearly

erred) in finding that the subpoena—which it based on two previous, abandoned theories—sought information too attenuated from Ms. Ochoa's sex-discrimination claim to enforce. This the EEOC cannot do—as the panel perhaps implicitly acknowledged when it did not indicate (as it well could have) that it would have reached the same result under either standard. Cf. *Staehr* v. *Alm*, 269 F. App'x 888, 891 (11th Cir. 2008) (per curiam) (noting that "[a]ppellant loses under either mode of review"); *Scalisi* v. *Fund Asset Mgmt., L.P.*, 380 F.3d 133, 137 n.6 (2d Cir. 2004) (noting that "we would reach the same conclusion under either standard").

Although the government argued in opposing certiorari that the Ninth Circuit's judgment could be affirmed on the alternative basis that the district court itself applied the wrong legal standard in determining relevance (which it did not), the proper remedy would have been for the Ninth Circuit to remand for the district court to apply the proper standard in the first instance—not rendition by the court of appeals. See, e.g., *Toyo Tire Holdings of Ams. Inc.* v. *Cont'l Tire N. Am., Inc.*, 609 F.3d 975, 983 (9th Cir. 2010). Subpoena enforcement determinations are properly vested with district courts, subject only to deferential appellate review. As a result, the judgment of the Ninth Circuit cannot stand.

ARGUMENT

I. As Every Circuit Except The Ninth Has Held, Courts Of Appeals Should Review Decisions To Enforce Or Quash Agency Subpoenas With Deference.

In deciding whether to enforce a subpoena issued by an agency, a district court must consider whether the subpoena overreaches the agency's authority; whether the subpoena seeks relevant information; whether the subpoena imposes an unreasonable burden; and whether the subpoena issued in bad faith. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-53 (1950); *United States* v. *Powell*, 379 U.S. 48, 58 (1964). The issues before the district court "are neither minor nor ministerial matters." *Okla. Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 217 n.57 (1946).

The EEOC possesses narrower subpoena authority than other agencies: "[U]nlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled to access only to evidence 'relevant to the charge under investigation.'" *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 64 (1984) (footnote omitted) (quoting 42 U.S.C. § 2000e-8(a)). Before enforcing a subpoena issued by the EEOC, "[t]he district court has a responsibility to satisfy itself that the charge is valid and that the material requested is 'relevant' to the charge * * * and more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose." *Id.* at 72 n.26.

As every circuit except the Ninth has held when considering the issue, a district court's decision about whether to enforce an administrative subpoena should be reviewed with deference. This conclusion follows inexorably from the text of the governing statute; this Court's precedent on standards of review; the district court's superior position to apply the fact-sensitive legal standard; the standard of review applicable to decisions regarding other subpoenas; and factors of judicial economy.

A. The Governing Statute Indicates That District Courts Have Discretion In Enforcing EEOC Subpoenas.

In *Pierce* v. *Underwood*, this Court identified "the language and structure of the governing statute" as the first factor to be considered in the standard-of-review analysis. 487 U.S. at 559. Here, Section 11 of the National Labor Relations Act, 29 U.S.C. § 161(1), controls the EEOC's subpoena authority. (Both the EEOC and the National Labor Relations Board issue subpoenas under the same statutory provision and regulations that are identical in all relevant respects. See 42 U.S.C. § 2000e-9.) The statute does not require a district court to enforce EEOC subpoenas, but merely provides the district court with jurisdiction to do so: a "district court * * * shall have jurisdiction to issue to such person an order requiring such person * * * to produce evidence." 29 U.S.C. § 161(2). Nothing in the statute requires the district court to exercise this jurisdiction in any particular manner, strongly suggesting

that the district court possesses its usual discretion regarding the enforcement of administrative subpoenas. See *Goodyear Tire & Rubber Co.* v. *NLRB*, 122 F.2d 450, 453 (6th Cir. 1941).

In *Goodyear*, the Sixth Circuit held that because "the statute does not require the District Court to issue the order, but simply gives it jurisdiction to issue," enforcement of an NLRB subpoena is "confided to the discretion of the District Court, which is to be judicially exercised." *Ibid.* The Sixth Circuit thus concluded that its review "extends no further than the determination as to whether or not there was an abuse of its discretion." *Ibid.*; see also *NLRB* v. *Friedman*, 352 F.2d 545, 547 (3d Cir. 1965) (relying on *Goodyear* for the abuse-of-discretion standard of review); *NLRB* v. *Consol. Vacuum Corp.*, 395 F.2d 416, 419-20 (2d Cir. 1968) (citing *Friedman* for the standard of review); *NLRB* v. *G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1982) (per curiam) (same). A later decision from the Sixth Circuit reiterated that under the statutory text, "[m]anifestly, the district court ordinarily will have discretion to determine whether it will issue such an order." *NLRB* v. *Detroit Newspapers*, 185 F.3d 602, 605 (6th Cir. 1999).

Courts in EEOC subpoena cases have, in turn, relied upon this line of cases to hold that the standard of review should be abuse of discretion. See, e.g., *Roadway Express*, 261 F.3d at 638 (citing *Detroit Newspapers* for the standard of review); *Technocrest*, 448 F.3d at 1038 (citing *Roadway Express* for the standard of review). The statutory language thus provides a

solid basis for the courts of appeals' holding that the exercise of discretion by district courts in determining whether to enforce EEOC subpoenas should be reviewed for abuse of that discretion.

B. This Court's Precedent Dictates That Review Should Be For Abuse Of Discretion.

This Court's precedent governing standards of review compels the conclusion that review should be for abuse of discretion. Where, as here, a district court is better positioned than a court of appeals to decide an issue, district courts need flexibility to decide that issue.

The seminal case on the appropriate standard of review is *Pierce*, which concerned review of a fee award under the Equal Access to Justice Act. 487 U.S. at 555. Under *Pierce*, the standard-of-review inquiry includes factors such as "the language and structure of the governing statute," *id.* at 559; "[t]he non-amenability of the problem to rule, because of the diffuseness of circumstances, novelty, vagueness, or similar reasons that argue for allowing experience to develop," *id.* at 562 (quoting Rosenberg, *supra*, at 663); whether a decision "ordinarily has * * * substantial consequences" requiring "it to be reviewed more intensively," *id.* at 563; and whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question," *id.* at 559-60 (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114

(1985)). Here, all relevant factors cut in favor of review for abuse of discretion.[2]

Most important, as in *Pierce*, district courts are better positioned than courts of appeals to decide issues related to enforcement of administrative subpoenas. For example, whether a subpoena seeks relevant information and whether the information is within the scope of the agency's authority "will turn upon not merely what was the law, but what was the evidence regarding the facts." *Pierce*, 487 U.S. at 560. And whether an agency issued a subpoena in bad faith or for an improper purpose is a factual inquiry. "By reason of settlement conferences and other pretrial activities," in making these determinations "the district court may have insights not conveyed by the record" that bear on "matters [such] as whether particular evidence was worthy of being relied upon." *Ibid.*

The courts of appeals are far less equipped to resolve these issues on a cold appellate record, and "[e]ven where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense." *Ibid.* Unlike district courts, appellate courts do not

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[2] Because the statute in *Pierce* provided no guidance on the standard of review, the Court focused on whether "one judicial actor is better positioned than another to decide the issue in question." 487 U.S. at 559-60 (quoting *Miller*, 474 U.S. at 114); see also *Koon* v. *United States*, 518 U.S. 81, 98 (1996) (relying on district courts' "institutional advantage over appellate courts in making these sorts of determinations" in adopting an abuse-of-discretion standard of review).

have the benefit of interacting with the parties and their counsel over time. Unlike district courts, appellate courts do not hear live testimony to assess credibility. And unlike district courts, appellate courts do not have a continuing relationship with the subject matter of the litigation, which gives them more context to evaluate discovery and subpoena disputes.

Further, this Court noted in *Pierce* that only deferential review gives the district court the necessary flexibility to resolve questions involving "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Id.* at 561-62 (quoting Rosenberg, *supra*, at 662). Discretionary review of a district court's decision is thus appropriate when "the number of possible situations is large," and this Court is "reluctant either to fix or sanction narrow guidelines for the district courts to follow." *Id.* at 562 (quoting *Curtiss-Wright Corp.* v. *Gen. Elec. Co.*, 446 U.S. 1, 10-11 (1980)).

The same is true here. Whether a subpoena should be enforced turns on special, narrow facts about the particular request and the particular facts of the investigation. For an EEOC subpoena, the decision also depends on the specific allegations of the charge. Given the wide variety in facts, decisions are "little susceptible * * * of useful generalization." *Ibid.* Like the issuance of Rule 11 sanctions, enforcement of an administrative subpoena requires "fact-intensive, close calls." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (citation omitted); see also *id.* at 402 ("Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal

the pertinent facts and apply the fact-dependent legal standard* * * *"). Reviewing the decision to enforce or quash an administrative subpoena under a deferential standard will provide a district court with the "needed flexibility" to resolve each case on its unique facts. *Pierce*, 487 U.S. at 562.

Moreover, the practical consequences of modifying or quashing a subpoena also militate in favor of an abuse-of-discretion standard. See *id.* at 553. If an EEOC subpoena is not enforced, the agency has numerous alternative means to gather additional information. It can, for example, file a broader charge of its own (through which it may subpoena more information). So the consequences of non-enforcement are correspondingly minor and therefore warrant less "intensive" appellate review. Indeed, the district court here noted that the agency's request for pedigree information was not foreclosed permanently—just on the facts as they existed at that time. Pet. App. 30.

In adopting an abuse-of-discretion standard of review, the courts of appeals have properly followed this Court's precedent—most notably *Pierce*—in recognizing the fact-bound, flexible nature of the decision. For example, the Fifth Circuit has explained that "the district court may weigh such equitable criteria as reasonableness and oppressiveness in issuing a subpoena for documents." *Packard Electric*, 569 F.2d at 318. These factors suggest that a court must undertake "a balancing of hardships and benefits, and the standard

by which we review such matters of relative burdensomeness is 'abuse of discretion.'" *Ibid.*

The D.C. Circuit has recognized that questions of relevance in administrative subpoenas are "essentially factual in nature." *FTC* v. *Lonning*, 539 F.2d 202, 210 n.14 (D.C. Cir. 1976). And the Tenth Circuit has noted that "elemental principles" dictate that "whether a subpoena duces tecum should be enforced is in the first instance a question for the trial court, and its decision should not be disturbed on appeal unless it clearly appears it is arbitrary and finds no support in the record." *Shotkin* v. *Nelson*, 146 F.2d 402, 404 (10th Cir. 1944).[3]

Precedent thus confirms what the statutory text makes plain—decisions regarding enforcement of EEOC subpoenas should be reviewed for abuse of discretion, and not, as the Ninth Circuit does, *de novo*.[4]

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[3] The proposition that district-court determinations to enforce or quash EEOC subpoenas should be reviewed for abuse of discretion follows so inexorably from the "elemental principles" embodied in this Court's precedents that most courts of appeals' opinions have not required extensive analysis to reach that conclusion. See, e.g., *Royal Caribbean*, 771 F.3d at 760; *Kronos*, 620 F.3d at 295; *Technocrest*, 448 F.3d at 1038; *United Air Lines*, 287 F.3d at 649; *Roadway Express*, 261 F.3d at 638.

[4] The case often cited as the source of the Ninth Circuit's rule, *EPA* v. *Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 445-46 (9th Cir. 1988), relied on a false dichotomy between review for clear error and review *de novo* created in *United States* v. *McConney*, 728 F.2d 1195, 1200-01 (9th Cir. 1984) (en banc). Notably, *McConney* predated the explication of the abuse-of-discretion standard in *Pierce* and its progeny.

C. Reviewing EEOC Subpoena Determinations For Abuse Of Discretion Is Consistent With Review Of Similar Decisions.

Applying an abuse-of-discretion standard to review enforcement of administrative subpoenas is not only consistent with this Court's precedent, but also with the standards of review applied in similar contexts. This Court has described an agency's investigative function as "essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence." *Powell*, 379 U.S. at 57 (quoting *Walling*, 327 U.S. at 216); see also *Morton Salt Co.*, 338 U.S. at 642 (explaining that the inquisitorial power of an agency "is more analogous to the Grand Jury").

In both contexts, it is well established that a district court's decision is reviewed for abuse of discretion. See *In re Agent Orange Prod. Liab. Litig.*, 517 F.3d 76, 102 (2d Cir. 2008) ("We review discovery rulings for abuse of discretion.").[5] Even the Ninth Circuit has acknowledged that district court decisions regarding grand jury subpoenas must be reviewed with deference: "We review denial of a motion to quash a Grand Jury subpoena for abuse of discretion." *United States* v. *Chen*, 99 F.3d 1495, 1499 (9th Cir. 1996). So have

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[5] See also *Theriot* v. *Par. of Jefferson*, 185 F.3d 477, 491 (5th Cir. 1999) ("We review a district court's decision denying discovery, including quashing deposition subpoenas, for abuse of discretion."); *Linder* v. *Dep't of Def.*, 133 F.3d 17, 24 (D.C. Cir. 1998) ("Because the district court enjoys wide latitude in resolving discovery issues, we review its determination of the scope of the subpoenas for abuse of discretion.").

other courts, including this Court. *Nixon*, 418 U.S. at 702 ("Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues.").[6]

The courts of appeals have relied on the standard of review applied to subpoenas generally in holding that review of administrative subpoenas should be for abuse of discretion. For example, the Tenth Circuit relied on general principles in considering the standard of review for a district court decision enforcing an administrative subpoena issued by the War Powers Board:

> Whether a subpoena duces tecum should be enforced is in the first instance a question for the trial court, and its decision should not be disturbed on appeal unless it clearly appears it is arbitrary and finds no support in the record. We deem it unnecessary to cite an array of authorities in support of these elemental principles.

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[6] See also *In re Impounded*, 241 F.3d 308, 312 (3d Cir. 2001) ("We review the decision to quash a grand jury subpoena for abuse of discretion."); *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requenaharman*, 913 F.2d 1118, 1122 (5th Cir. 1990) ("A district court's order quashing a grand jury subpoena can only be overturned for an abuse of discretion."); *In re Grand Jury Matters*, 751 F.2d 13, 16 (1st Cir. 1984) ("We review a district court decision to quash, or not quash, a grand jury subpoena, solely for abuse of discretion, with much deference being owed to the lower court's authority.").

Shotkin, 146 F.2d at 404. In reviewing a district-court decision regarding an EEOC subpoena, the Eighth Circuit has noted that the general standard of review applicable to subpoenas under Rule 45 is abuse of discretion. *Technocrest*, 448 F.3d at 1038 (citing *Pointer* v. *DART*, 417 F.3d 819, 821 (8th Cir. 2005)). Similarly, the D.C. Circuit, in reviewing a decision regarding enforcement of a subpoena issued by the Federal Trade Commission, relied on the abuse-of-discretion standard of review applicable to decisions to enforce grand jury subpoenas. See *FTC* v. *GlaxoSmithKline*, 294 F.3d 141, 146 (D.C. Cir. 2002) (quoting *In re Sealed Case*, 146 F.3d 881, 883 (D.C. Cir. 1998)).

Reviewing enforcement of administrative subpoenas for abuse of discretion is thus entirely consistent not only with text and precedent, but also with the review of similar trial-court determinations.

D. Judicial Economy And Other Factors Confirm That Review For Abuse Of Discretion Is Appropriate.

Other factors also confirm that deferential review is appropriate. In particular, judicial economy counsels strongly in favor of deference to the trial court. *De novo* review, by providing a greater likelihood of appellate success, necessarily fosters appeals—thereby increasing the costs and delay of litigation. "[D]eference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from

pursuing marginal appeals, thus reducing the amount of satellite litigation." *Cooter & Gell*, 496 U.S. at 404. Such delay injures plaintiffs waiting for their charges to be resolved.

The disparity in resources between the parties only exacerbates the need for deferential review. An agency, which controls the scope of the subpoena, can appeal any unfavorable district-court decision with the virtually unlimited resources of the federal government. Private litigants, in contrast, must weigh the benefits of resisting an overbroad administrative subpoena against the costs of counsel. A *de novo* standard of review would require the private litigant to litigate the same issue twice, both before the district court and again on appeal.

In sum, as the text of the governing statute suggests, the precedent of this Court dictates, and analogous contexts confirm, decisions regarding enforcement of administrative subpoenas should be reviewed for abuse of discretion. District courts are simply better positioned to decide these questions, consistent with review of enforcement of other subpoenas. Accordingly, the Ninth Circuit should be reversed and the case remanded for application of the proper legal standard in the first instance.

II. The Ninth Circuit's Judgment Cannot Be Affirmed On Any Alternative Ground.

In its brief in opposition to the petition, the government argued that the judgment below should be affirmed even under an abuse-of-discretion standard because the district court committed an error of law that amounts to an abuse of discretion. Opp. at 12 ("A district court by definition abuses its discretion when it makes an error of law." (internal quotation marks and citation omitted)). But the court of appeals, like this Court, is a "court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Thus even if the district court applied the wrong legal standard (which it did not, as demonstrated below), the proper remedy would have been for the Ninth Circuit to remand for the district court to apply the correct standard. See, e.g., *Toyo Tire*, 609 F.3d at 983 ("[W]e reverse and remand for the district court to properly weigh the appropriate factors.").

Because the parties did not brief below whether the district court abused its discretion (given controlling Ninth Circuit precedent), and because the panel reviewed the district court *de novo*, not for abuse of discretion, this Court should follow its usual course and remand for the Ninth Circuit to apply the abuse-of-discretion standard in the first instance. See, e.g., *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1653-54 (2016) (declining to address arguments not considered by the court of appeals and remanding).

Regardless, the judgment cannot be affirmed on any alternative basis because (i) the district court did not apply an incorrect legal standard, and (ii) the district court did not abuse its discretion. In light of its experience with the parties' litigating positions and the history of the case, the district court properly compared the information sought by the EEOC to the allegations in correctly concluding that the pedigree information was not relevant to the EEOC's investigation. The Ninth Circuit panel simply misread the district court's opinion in concluding that it applied an incorrect standard of relevance.

A. The District Court Did Not Apply An Incorrect Legal Standard.

This Court has cautioned that courts of appeals should be hesitant to infer that a district court has applied a wrong legal standard in making a discretionary decision: "An appellate court should not presume that a district court intended an incorrect legal result when the order is equally susceptible of a correct reading, particularly when the applicable standard of review is deferential." *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 386 (2008). The Ninth Circuit failed to heed this admonition.

When conducting its relevance analysis, the district court recognized that the EEOC's primary motive in acquiring the pedigree information "related to the ADA charge," not the sex-discrimination charge. Pet. App. 28. The district court noted the possibility that

the EEOC was "trolling for possible complainants" rather than investigating Ochoa's charge. *Id.* at 29. And the district court noted that the EEOC already had all of the information that would cast light on the gender discrimination alleged by Ochoa. *Ibid.*

After conducting this analysis, the district court noted, in a single sentence, that the information may become relevant in the future: "At that point, pedigree information may become relevant to an investigation and the EEOC may find it necessary to seek such information." *Id.* at 30.

Based on this sentence, the Ninth Circuit suggested that the district court thought the evidence was relevant only if it was "necessary" to the EEOC's investigation. *Id.* at 12 ("As we have explained, however, that line of reasoning is invalid: The EEOC's need for the evidence—or lack thereof—simply does not factor into the relevance determination.").

The Ninth Circuit misread the district court's opinion. The district court did not state that evidence was "relevant" only if it was "necessary" to the EEOC. To the contrary, the district court referred only to whether the EEOC would "find it necessary to seek" the pedigree information through another subpoena. As an English idiom, to "find it necessary" to take an action refers to an actor choosing or deciding to take the action.[7] The district court did not, by recognizing

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[7] Cf. *McCulloch* v. *Maryland*, 17 U.S. 316, 413 (1819) ("If reference be had to its use, in the common affairs of the world, or in approved authors, we find that [the word 'necessary'] frequently

that the EEOC might "find it necessary" to seek information in the future, equate "relevance" and "necessity."

Particularly in light of *Sprint*'s admonition that a court of appeals should interpret a district court's opinion charitably, the Ninth Circuit erred in concluding that the district court applied the wrong legal standard. Even if the Ninth Circuit were concerned that the sentence indicated that the district court might have applied the wrong standard, the appropriate remedy was to remand for clarification, not to reverse (much less to render). *Sprint*, 552 U.S. at 386.

Moreover, the legal standard that the Ninth Circuit thought the district court applied—considering the necessity of the subpoenaed information to the investigation as a factor in its relevance—would not have been erroneous. The panel's sole support was *EEOC* v. *University of Pennsylvania*, 493 U.S. 182 (1990). Pet. App. 11 (citing 493 U.S. at 188). But that case dealt with the scope of a peer review privilege, not the EEOC's subpoena power. 493 U.S. at 188. Indeed, the University conceded there that the information sought passed "the relevance test" that limits the EEOC's subpoena power. See *id.* at 191-92. Neither the EEOC nor the Ninth Circuit has cited any authority that supports the proposition that an agency's need for information is irrelevant to its subpoena power.

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imports no more than that one thing is convenient, or useful, or essential to another.").

Logically, whether information is "necessary" to cast light on the charge is quite significant to the relevance of that information. The courts of appeals have recognized as much: "The EEOC failed to present a cogent argument as to how the additional information sought, which pertains to employees and applicants from around the world suffering from any medical condition, in the light of the information the EEOC already possesses, would further aid the Commission in resolving the issues in dispute regarding Mr. Morabito's charge." *Royal Caribbean*, 771 F.3d at 762; see also *Lonning*, 539 F.2d at 210 n.14 (referring to whether documents "are relevant and necessary to an inquiry by the FTC"). Common sense confirms that the government should not be able to subpoena information for which it has no need because the information will cast no additional light on the investigation.

B. Even If The District Court Applied An Incorrect Legal Standard, The Proper Remedy Was To Remand, Not Render Judgment.

Even if the district court abused its discretion by applying an incorrect legal test for relevance, the judgment below cannot be affirmed. When a district court's exercise of discretion is influenced by legal error, a court of appeals should correct the legal error and remand for exercise of discretion under the correct standard. See, e.g., *Toyo Tire*, 609 F.3d at 983.

For example, in *FTC* v. *Boehringer Ingelheim Pharmaceuticals*, the D.C. Circuit stated that it reviews "a district court's decision to enforce an administrative subpoena for abuse of discretion," and that a "district court necessarily abuses its discretion if it applies the incorrect legal standard, a question that is reviewed *de novo*." 778 F.3d at 148. After determining that the district court applied the incorrect legal standard, the D.C. Circuit correctly remanded the case for the district court to exercise its discretion under the correct legal standard. *Id.* at 158.

This Court addressed this principle in the context of whether evidence is relevant at trial in *Sprint*. After concluding that the district court applied the incorrect standard for relevance, the Tenth Circuit "determined that the evidence was relevant and not unduly prejudicial, and reversed and remanded for a new trial." *Sprint*, 552 U.S. at 383. This Court explained that even if the court of appeals were correct that the district court applied the wrong standard, it erred by performing the balancing test itself: "Rather than assess the relevance of the evidence itself and conduct its own balancing of its probative value and potential prejudicial effect, the Court of Appeals should have allowed the District Court to make these determinations in the first instance, explicitly and on the record." *Id.* at 387; see also *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291 (1982) (noting that when a district court "fail[s] to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the

missing findings"). The same rule should apply to district-court determinations of relevance in the administrative subpoena context.

Moreover, even if the district court erred in analyzing relevance, the district court's consideration whether to enforce the subpoena was not complete. Before the district court, McLane explained that providing the pedigree information (for more than 14,000 individuals) would impose an undue burden because it did not possess the requested information in a readily accessible format (and much of the information McLane does not possess at all). JA 216-26. Because the district court refused to enforce the subpoena of the pedigree information on relevance grounds, it never reached McLane's burden argument.

Like relevance, the determination of burden required factual findings by the district court in the first instance. See *United Air Lines*, 287 F.3d at 653 ("What is unduly burdensome depends on the particular facts of each case and no hard and fast rule can be applied to resolve the question." (quoting *FTC* v. *Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980))); *Dow Chem. Co.* v. *Allen*, 672 F.2d 1262, 1267 (7th Cir. 1982) ("Similarly, court assessments of whether disclosure would be burdensome and of what restrictions might be appropriate are decisions within the sound discretion of the trial court and should only be reversed for abuse of discretion* * * *"). Because the district court made no finding as to undue burden, McLane could not have asserted it as an alternative ground for affirmance. See *Am. Fed. Grp., Ltd.* v. *Rothenberg*, 136 F.3d 897, 912 (2d

Cir. 1998) ("[T]o justify even partial affirmance on this alternative basis would require an improper incursion by this court into first-instance fact-finding."); see also *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (explaining impropriety of appellate court intrusions into fact-finding function of district courts).

Thus, even if the government were correct that the district court applied an incorrect legal standard in reviewing the enforceability of a subpoena, the judgment of the Ninth Circuit must be reversed and the case remanded to the district court for exercise of its discretion under a correct standard. At a minimum, the Ninth Circuit should have remanded to the district to consider McLane's other arguments against enforcement of the subpoena, including the undue burden of producing the pedigree information.

C. Like The Ultimate Decision Whether To Enforce A Subpoena, Relevance Should Be Reviewed For Abuse Of Discretion.

The government's brief in opposition suggests that even if a district court's ultimate decision to enforce an administrative subpoena should be reviewed for abuse of discretion, *de novo* review should apply to legal determinations that are part of the analysis. Opp. at 12.

This Court rejected precisely this approach to the standard of review in *Koon* v. *United States*.[8] It is true

[8] After *Koon*, Congress enacted the PROTECT Act, which requires *de novo* review of the "district court's application of the

that "[a] district court by definition abuses its discretion when it makes an error of law." 518 U.S. at 100. "[A]n abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction." *Ibid.* But this proposition "does not mean, as a consequence, that parts of the review must be labeled *de novo* while other parts are labeled an abuse of discretion." *Ibid.* Instead, the court of appeals should simply review for abuse of discretion, while recognizing that "[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Ibid.*

Similarly, in *Cooter & Gell*, this Court rejected the Ninth Circuit's "three-tiered" approach to review of Rule 11 sanctions: "That Circuit reviews findings of historical fact under the clearly erroneous standard, the determination that counsel violated Rule 11 under a *de novo* standard, and the choice of sanction under an abuse-of-discretion standard." 496 U.S. at 399. Rather than adopting the Ninth Circuit's approach of parsing a discretionary decision out into separate pieces, this Court adopted "a unitary abuse-of-discretion standard [for] all aspects of a Rule 11 proceeding." *Id.* at 403. These decisions should guide the analysis here.

Relevance, like the overall decision whether to enforce an administrative subpoena, should thus be reviewed for abuse of discretion. There is good reason.

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guidelines to the facts." 18 U.S.C. § 3742(e). Where, as here, Congress has not spoken, *Koon*'s analysis remains instructive.

Like the overall decision, relevance turns on "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Id.* at 404 (quoting *Pierce*, 487 U.S. at 561-62). Although "relevance" for purposes of an EEOC subpoena is easier to satisfy than "relevance" for introduction of evidence at trial, the inquiries are similar.[9] And relevance has long been recognized as an issue uniquely within the trial court's discretion. McCormick explains that because of the variety of case-specific factors—including "[evidence's] relationship to the other evidence in the case, the importance of the issues on which it bears, and the likely efficacy of cautionary instructions to the jury"—"much leeway is given trial judges." 1 MCCORMICK ON EVID. § 185 (7th ed. 2016) (footnotes omitted). Wigmore notes that "there can be no inflexible test of admissibility, in practical logic for judicial trials." 1 WIGMORE ON EVID. § 212 (3d ed. 1942) (footnotes omitted).

Although a district court must apply law in determining whether information is relevant, a mixed question of law and fact that turns heavily on case-specific facts should be reviewed with deference: "The nontechnical nature of the statutory standard, the close

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[9] The EEOC may discover only "material that might cast light on the allegations against the employer." *Shell Oil*, 466 U.S. at 68-69. In this context, "might" requires "a realistic expectation rather than an idle hope that something may be discovered." *United Air Lines*, 287 F.3d at 653 (citation omitted). The difference between a "realistic expectation" and an "idle hope" necessarily requires a case-specific, fact-intensive inquiry that depends on the language of the charge, the information requested, and the full context of the case.

relationship of it to the date of practical human experience, and the multiplicity of relevant factual elements" confirm "that primary weight in this area must be given to the conclusions of the trier of fact." *Comm'r* v. *Duberstein*, 363 U.S. 278, 289 (1960).

And because of the fact-dependent nature of the ruling, *de novo* review of relevance determinations would not create clarity in the law. "[D]eferential review of mixed questions of law and fact is warranted when it appears * * * that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 233 (1991); see also *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748-49 (2014) (holding that because relevance is "not susceptible to 'useful generalization' of the sort that *de novo* review provides * * * an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's [relevance] determination" (quoting *Pierce*, 487 U.S. at 562)). A ruling about the relevance of specific information in one investigation of specific charge language will have little value in determining the relevance of different information to a different charge.

The majority of courts of appeals have correctly recognized that questions of relevance of administrative subpoenas are "essentially factual in nature." *Lonning*, 539 F.2d at 210 n.14; see also *FTC* v. *Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) (same); *In re McVane*, 44 F.3d 1127, 1135 (2d Cir. 1995) ("[I]f the district court concludes that the information sought by

the agency is relevant, we will affirm unless that determination is clearly erroneous."); *Hintze* v. *IRS*, 879 F.2d 121, 125 (4th Cir. 1989) (describing "whether the IRS issued the challenged summonses for legitimate purposes" as a "fact-specific question" reviewed for clear error), overruled on other grounds by *Church of Scientology* v. *United States*, 506 U.S. 9, 15 & n.8 (1992); *Dow Chemical*, 672 F.2d at 1267 ("A finding by the district court that documents are reasonably relevant to a legitimate agency purpose cannot be overturned absent a showing that the factual determinations on which it is based are clearly erroneous * * * *").[10]

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[10] Because a court abuses its discretion when it makes a clearly erroneous finding of fact, see, e.g., *United States* v. *4.85 Acres of Land, More or Less, Situated in Lincoln Cty.*, 546 F.3d 613, 617 (9th Cir. 2008), a clear-error standard is not incompatible with abuse-of-discretion review. To the extent there is a modest difference between the two standards, abuse of discretion would be the appropriate standard for at least three reasons (although the Court need not reach this issue to dispose of this case). First, review for clear error involves splitting the district court's decision into multiple pieces—*de novo* review for legal determinations and clear-error review for factual determinations. This Court rejected that move in *Koon*. 518 U.S. at 100; see also *Cooter & Gell*, 496 U.S. at 399 (selecting "a unitary abuse-of-discretion standard" over a "three-tiered" approach). Second, relevance determinations apply the law to facts in a necessarily mixed question that does not lend itself to a facts-only review for clear error. Third, as discussed above (at 19-21), the statutory language strongly suggests that the district court possesses its usual discretion regarding the enforcement of administrative subpoenas generally.

D. The District Court Did Not Abuse Its Discretion In Finding That The Information Was Not Relevant.

In this case, based on its knowledge of the facts, the allegations in the charge, and the EEOC's previous arguments, the district court concluded that the EEOC had no realistic expectation that interviewing various McLane employees might cast light on Ms. Ochoa's charge against McLane. Pet. App. 28-30. Its demand for information and request to interview these individuals represented, at best, "an idle hope" that it might uncover information (or uncover "victims"). The district court correctly found the requested information to be irrelevant.

If the EEOC could receive "pedigree" information in this case to interview other employees and ask about discrimination, there is no reason that it could not receive identical information in every other investigation. The EEOC would merely need to recite the boilerplate justification that it "wants to contact other * * * employees and applicants for employment * * * to learn more about their experiences." *Id.* at 10. This would, in essence, resurrect the "unconstrained investigative authority" rejected by this Court. *Shell Oil*, 466 U.S. at 65.

Moreover, based on its familiarity with the history of the litigation (including the EEOC's shifting positions), the district court recognized that the EEOC's primary motive in seeking the pedigree information was not to investigate the sex-discrimination charge:

"Judging by the E.E.O.C.'s filings and the discussion at the hearing, the primary motivation for obtaining the pedigree information related to the ADA charge." Pet. App. 28. The district court's conclusion about the EEOC's improper motive—based on its credibility determinations and its familiarity with the EEOC's evolving litigation positions—is entitled to deference.

Indeed, the Ninth Circuit's theory of relevance is inconsistent with the facts of this case and the sex-discrimination charge that the EEOC is investigating. Ms. Ochoa's charge alleged that because she was terminated for failing the physical capacity evaluation, she was "discriminated against because of [her] sex, female (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended." JA 42-43.

Although the panel was correct that a charge need not "allege discrimination based on any particular legal theory," Pet. App. 11, the EEOC's investigation must still be limited to the factual allegations in the charge.

One possible legal theory is disparate impact: the theory that the physical capacity evaluation "ha[s] a 'disproportionately adverse effect on [women]' and [is] otherwise unjustified by a legitimate rationale." *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015) (quoting *Ricci* v. *DeStefano*, 557 U.S. 557, 577 (2009)). As the district court correctly recognized, McLane provided all information that might cast light on a disparate impact theory. The "pedigree information" requested by the

EEOC was irrelevant to whether the neutral test had a disproportionately adverse effect on women and whether it was justified by a legitimate rationale.

The Ninth Circuit appeared to recognize this fact, suggesting instead that speaking with other employees (some of the approximately 14,000 individuals) might reveal "disparate treatment" of men and women. To the extent that the Ninth Circuit believed that "learn[ing] more about [other individuals'] experiences" with the test would be relevant to Ochoa's allegations against McLane, the Ninth Circuit misunderstood the facts. Pet. App. 10. The test—which is entirely objective and measured by a machine—is administered and scored by a third party, Industrial Physical Capability Services (IPCS). JA 365 & n.1. Investigating whether the test is administered or scored in a discriminatory fashion would require a charge of discrimination against IPCS, not against McLane.

This leaves a theory of nationwide pattern or practice of disparate treatment of men and women with the same evaluation results. But this theory is utter speculation. Ms. Ochoa certainly never alleged the existence of any such policy.

Indeed, such a discriminatory policy would seem to be inconsistent with Ms. Ochoa's allegation that the evaluation is applied indiscriminately: "The physical capability strength test is given to all employees returning to work from medical leave and all new hires, regardless of job position." *Id.* at 43.

Even if Ms. Ochoa's supervisor had a policy of firing women—but not men—who failed the physical capacity evaluation (an allegation absent from the charge), there is no reason to believe that any other supervisors would engage in the same disparate treatment. See, e.g., *Wal-Mart* v. *Dukes*, 564 U.S. 338, 350 (2011) ("[T]he mere claim by employees of the same company that they have suffered a Title VII injury * * * gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor."). Without more in the charge against the employer, the possibility of a single instance of disparate treatment does not justify a nationwide investigation into a company's practices, much less requiring the contact information for more than 14,000 individuals. Such a claim applies only to the employer location where the charge is made, further showing the disconnect between the charge and the EEOC's request.

The EEOC has no more than an idle hope that speaking with these various employees across the country will reveal information that casts light on Ms. Ochoa's charge. The scope of the EEOC's investigatory powers is limited to "evidence 'relevant' to the charge under investigation," evidence that might "cast light on the allegations against the employer" in the charge. *Shell Oil*, 466 U.S. at 68-69. The investigation that the EEOC sought to undertake in this case was untethered to the language of Ochoa's charge and represents precisely the "unconstrained investigative authority" that

Congress sought to prevent the EEOC from exercising. *Id.* at 65.

This is not the first time an agency has sought to subpoena nationwide employment data unrelated to its investigation. In *Goodyear*, the NLRB charged a company with, *inter alia*, discriminating against employees because of their union membership or activities. 122 F.2d at 451-52. Not only did the NLRB seek subpoena records related to the 158 departments where this discrimination allegedly occurred, but it sought "a card index of all active and inactive employees showing the name, department and clock-card number." *Id.* at 452. The Sixth Circuit concluded that the subpoena of all employee data "does not call for 'evidence that relates to any matter under investigation or in question.'" *Id.* at 453 (quoting 29 U.S.C. § 161). "The Board virtually concedes this when it asks for these cards not as evidence, but in order to facilitate the examination of other data." *Ibid.*

As in this case, the agency claimed that the full set of employment information "b[ore] upon the alleged discriminatory discharges, layoffs or demotions of the 93 employees named in the complaint." *Ibid.* The Sixth Circuit readily rejected this argument: "The matter in question is not the entire scope of the company's labor relationships." *Ibid.* "Obviously the request for the card index, said to be of 600,000 employees, necessarily contains a vast amount of irrelevant material." *Ibid.* Indeed, the Sixth Circuit concluded that the district court "exceeded the fair limits of judicial

discretion" in enforcing this portion of the subpoena. *Id.* at 454.

The same is true in this case. The matter under investigation is Ochoa's charge, not the entire scope of McLane's relationships with its employees. There is no reason to believe that the vast amount of pedigree information sought by the EEOC would cast light on Ochoa's allegation against McLane.

The district court understood the charge, the facts of the case, and the EEOC's shifting litigation positions far better than the Ninth Circuit understood them on a cold record. The district court did not abuse its discretion in concluding that the information sought by the EEOC was not relevant to its investigation of Ochoa's charge.[11]

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[11] To the extent the EEOC had information indicating that McLane had engaged in a pattern or practice of disparate treatment, the EEOC was and is able to bring a Commissioner's charge of systemic discrimination against McLane, which would permit this broader investigation into nationwide disparate treatment. 42 U.S.C. § 2000e-5(b). Filing such a charge would merely require a Commissioner to charge "in writing under oath or affirmation" that McLane "has engaged in [such an] unlawful employment practice." *Ibid.*

The EEOC's unwillingness (or inability) to take the relatively *de minimis* step of filing a Commissioner's charge alleging nationwide disparate treatment is telling.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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AND BRIEFS

DEC 14 2016

No. 15-1248

In the Supreme Court of the United States

MCLANE COMPANY, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a court of appeals should review for abuse of discretion or de novo a district court's decision concerning whether to enforce an administrative subpoena issued by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 804 F.3d 1051. The opinion and order of the district court (Pet. App. 18-33) is not published in the *Federal Supplement* but is available at 2012 WL 5868959.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2015. A petition for rehearing was denied on January 22, 2016 (Pet. App. 34). The petition for a writ of certiorari was filed on April 4, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

1. a. Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, prohibits employment practices that discriminate on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2, 2000e-3. Discrimination on the basis of sex includes discrimination "because of or on the basis of pregnancy." 42 U.S.C. 2000e(k).

An employer may violate Title VII through disparate treatment, which occurs when an employer intentionally treats "some people less favorably than others because of their race, color, religion, sex, or national origin." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). An employer may also violate Title VII through a facially neutral policy that has a disparate impact on employees of a particular race, color, religion, sex, or national origin and cannot be justified by "business necessity." *Ibid.*; 42 U.S.C. 2000e-2(k).

b. Congress assigned "[p]rimary responsibility for enforcing Title VII" to the Equal Employment Opportunity Commission (Commission or EEOC). *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 61-62 (1984) (citing 42 U.S.C. 2000e-5(a)). The Commission's responsibilities "are triggered by the filing of a specific sworn charge of discrimination," *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 190 (1990), which can be filed by or on behalf of "a person claiming to be aggrieved" by an employment practice or can be filed by an EEOC Commissioner, 42 U.S.C. 2000e-5(b). A charge is sufficient so long as it contains "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. 1601.12(b); see 42 U.S.C. 2000e-5(b) ("Charges shall

be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.").

When a charge is filed, the Commission must notify the employer. 42 U.S.C. 2000e-5(b); see *Shell Oil*, 466 U.S. at 62. It must then investigate "to determine whether there is reasonable cause to believe that the charge is true." *University of Pa.*, 493 U.S. at 190 (internal quotation marks omitted) (discussing 42 U.S.C. 2000e-5(b)). If the EEOC finds a charge substantiated, it must notify the employer and "endeavor to eliminate" the discriminatory practice "by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). If those methods are unsuccessful, the Commission "may bring [a civil suit] against the employer." *University of Pa.*, 493 U.S. at 191 (discussing 42 U.S.C. 2000e-5(f)(1)).

c. In order "[t]o enable the Commission to make informed decisions at each stage of the enforcement process," Title VII "confers a broad right of access to relevant evidence." *University of Pa.*, 493 U.S. at 191. It provides that the Commission shall "have access to, for the purposes of examination * * * any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by" Title VII and "is relevant to the charge under investigation." 42 U.S.C. 2000e-8(a).

Title VII enables the Commission to obtain the information to which it is entitled by "authoriz[ing] the Commission to issue a subpoena and to seek an order enforcing it." *University of Pa.*, 493 U.S. at 191 (citing 42 U.S.C. 2000e-9). The statute does so by authorizing the Commission to "exercise all of the powers conferred upon the National Labor Relations Board by 29

U.S.C. § 161," *Shell Oil*, 466 U.S. at 63; see 42 U.S.C. 2000e-9 ("For the purpose of all * * * investigations conducted by the Commission * * * section 161 of title 29 shall apply.").

Under those authorities, the agency may issue "subpenas requiring the attendance and testimony of witnesses or the production of any evidence." 29 U.S.C. 161(1). An employer that does not wish to comply may petition the Commission to revoke the subpoena on the ground that it "does not relate to any matter under investigation" or that it "does not describe with sufficient particularity the evidence whose production is required." *Ibid.*; see 29 C.F.R. 1601.16(b)(1) (setting forth procedures and deadlines). If the Commission rejects the petition for revocation and the employer still "refuse[s] to obey [the] subpena," the Commission may apply to a district court "to issue to such person an order requiring such person to appear before the" Commission to produce evidence, with "any failure to obey such order of the court" subject to the penalties of contempt. 29 U.S.C. 161(2).

d. In *Shell Oil*, *supra*, and *University of Pennsylvania*, *supra*, this Court explicated the standard for district courts to apply in determining whether to enforce EEOC subpoenas. Drawing from seminal cases addressing other administrative-subpoena schemes, the Court held that a district court should "satisfy itself that the charge is valid and that the material requested is 'relevant' to the charge," and "assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose." *Shell Oil*, 466 U.S. at 72 n.26 (citing *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-653 (1950)); see

University of Pa., 493 U.S. at 191 (same).[1] If the subpoena requirements are satisfied, the Commission has "an unqualified right to acquire [the] evidence" sought in the subpoena. *University of Pa.*, 493 U.S. at 192 (emphasis omitted).

This Court noted that the requirement of relevance to a charge—as opposed to relevance to possible misconduct, whether charged or not—was an important feature of Title VII. *Shell Oil*, 466 U.S. at 68. But it noted that this relevance requirement was "not especially constraining." *Ibid.* It explained that "courts ha[d] generously construed the term 'relevant,'" to "afford[] the Commission access to virtually any material that might cast light on the allegations against the employer." *Id.* at 68-69. That approach, the Court explained, was one that Congress had "implicitly endorsed" because after this judicial consensus developed, Congress chose to "leav[e] intact the statutory definition of the Commission's investigative authority," even as it made sub-

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[1] Courts of appeals have understood the *Morton Salt* and *Powell* framework that *Shell Oil* adapted for subpoena-enforcement decisions under Title VII to also permit a district court to deny enforcement of a subpoena when an employer demonstrates that compliance would be unduly burdensome. See, *e.g.*, Pet. App. 8; *Burlington N. R.R.* v. *Office of Inspector Gen.*, 983 F.2d 631 (5th Cir. 1993) (citing *Morton Salt*); *United States* v. *Westinghouse Elec. Corp.*, 788 F.2d 164 (3d Cir. 1986) (citing *Morton Salt* and *Powell*); *EEOC* v. *Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc) (citing *Morton Salt*); see also *EEOC* v. *Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014); *NLRB* v. *American Med. Response, Inc.*, 438 F.3d 188 (2d Cir. 2006); *EEOC* v. *Citicorp Diners Club, Inc.*, 985 F.2d 1036 (10th Cir. 1993); *EEOC* v. *Maryland Cup Corp.*, 785 F.2d 471, 475 (4th Cir.), cert. denied, 479 U.S. 815 (1986); *EEOC* v. *Bay Shipbuilding Corp.*, 668 F.2d 304, 313 (7th Cir. 1981).

stantial revisions to other portions of the enforcement scheme. *Id.* at 69.

2. a. For more than eight years, beginning in 2000, Damiana Ochoa worked in the position of "cigarette selector" for petitioner, a supply chain services company. Pet. App. 3; J.A. 49. Ochoa performed that job in a grocery distribution center in Arizona that was operated by petitioner's southwestern subsidiary, McLane Sunwest. Pet. App. 19. After more than seven years in her post, Ochoa took a maternity leave. *Id.* at 2-3; J.A. 32-35, 42, 50.

Ochoa sought to return to work three months later, in October 2007, but, according to Ochoa, was told she would not be allowed to return to her job unless she passed a strength test. Pet. App. 3; J.A. 42. According to Ochoa, at petitioner's direction, she took a strength test on three occasions, but was unable to pass. Petitioner then fired her. Pet. App. 3.

Ochoa promptly filed a charge of discrimination, alleging that her termination resulted from discrimination based on gender, as a result of pregnancy, in violation of Title VII, and further alleging that petitioner's use of strength tests for employees who had taken medical leave violated the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* See J.A. 41-43 (Ochoa's January 2008 charge). Ochoa explained in the charge that petitioner had advised her that "before returning to work, [she] had to take a" strength test; that she took the test on three occasions and did not pass; and that she "believe[d she] ha[d] been discriminated against because of [her] sex, female (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended." J.A. 42-43. She added that the strength test was "given to all employees returning to work from

a medical leave and all new hires, regardless of job position," and that she "believe[d] the test violates the Americans with Disabilities Act of 1990, as amended." J.A. 43.

The Commission notified petitioner of Ochoa's charge, J.A. 44-46, and began an investigation. In response to the Commission's inquiries, petitioner "disclosed that it uses the strength test at its facilities nationwide for all positions that are classified as physically demanding," and that it requires any employee returning from an absence of more than 30 days, and any job applicant, to pass a strength test as a condition of employment. Pet. App. 3. Petitioner also provided the Commission with "general information about the test and the individuals who had been required to take it at the Arizona subsidiary where Ochoa worked," including "each test taker's gender, job class, reason for taking the test, and score received (pass or fail)." *Ibid.*

Petitioner refused, however, to comply with the Commission's request for pedigree information that would enable the Commission to identify and contact individuals who had been required to take the test—specifically, the test-takers' names, social security numbers, last known addresses, and telephone numbers. Pet. App. 3; see J.A. 62-66 (August 2009 EEOC request for pedigree information). While petitioner's own records identified the test-takers using their names and social security numbers, petitioner removed that information from the records it provided and instead identified test-takers "only by an 'employee ID number' created solely for purposes of responding to the EEOC's investigation." Pet. App. 3-4; see J.A. 450, 475. And petitioner also "refused to disclose, for those

employees who had taken the test and were later terminated, when and why their employment was terminated." Pet. App. 4.

After learning that the strength-test requirements at petitioner's Arizona facility reflected a nationwide policy—with all of petitioner's grocery facilities using "the same test for the same purposes"—the Commission expanded its investigation, seeking data regarding petitioner's use of the strength test at petitioner's grocery facilities nationwide. Pet. App. 4. In addition, the Commission repeated its requests that petitioner provide test-takers' identifying information and petitioner's reasons for terminating the employees fired after taking strength tests. See J.A. 79-92 (August 2010 request concerning Ochoa charge and concerning investigation under the Age Discrimination in Employment Act); J.A. 379-391 (November 2010 request concerning Ochoa charge).[2]

Petitioner ultimately provided data concerning strength testing in its grocery facilities nationwide, com-

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[2] In August 2010, after receiving initial disclosures concerning petitioner's use of strength tests, the Commission initiated an inquiry into whether the testing had an unlawful impact on older employees in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* See J.A. 79-81. Under the ADEA, the Commission need not receive a charge of discrimination before initiating an investigation. 29 U.S.C. 211(a), 626(a). After petitioner declined to provide test-takers' identifying information and other data in connection with the ADEA charge, the Commission sought that information through subpoena, see J.A. 169-182, and then filed a complaint seeking enforcement of the subpoena, see Pet. App. 5. The district court declined to enforce the portion of the ADEA subpoena requiring disclosure of identifying information, and the Commission did not pursue an appeal. See *id.* at 5 n.1.

parable to the data it had provided for the Arizona facility where Ochoa worked. Pet. App. 4; see J.A. 337, 340-342. But it "again refused to provide either pedigree information or, for those test takers who were ultimately terminated, the reasons for termination." Pet. App. 4.

The Commission issued a subpoena in its investigation of the Ochoa charge seeking identifying information for the individuals that petitioner had required to take strength tests, as well as information concerning the reasons for the terminations of those who were fired after taking strength tests. Pet. App. 4; J.A. 92-106 (February 2011 subpoena). Petitioner again refused to provide test-takers' pedigree information—insisting instead that the Commission should determine whether the strength test was a valid job requirement without speaking to those who had taken it. Pet. App. 4; J.A. 340-342. It also declined to provide information concerning the reasons for the terminations of employees fired after taking strength tests. Pet. App. 4.

The Commission filed suit, seeking an order enforcing the Ochoa investigation subpoena. The Commission explained that the pedigree information it sought was relevant to whether petitioner engaged in gender discrimination through either disparate treatment or the use of a policy with an unlawful disparate impact. See J.A. 464, 505-506, 508-509. It explained that in order to assess the strength test, it was "important for the EEOC to be able to talk to actual people who took the test, whether they're men or women." J.A. 506. Such contact would shed light on whether the strength test was "being equally applied to all individuals." J.A. 508. In addition, the Commission explained, information from those who took the test was important to

assessing petitioner's contention that the test did not exert an impermissible disparate impact because it "measures actual work functions." J.A. 509; see *ibid.* ("[I]t makes sense that the EEOC would want to talk to people who actually perform these functions at their job to see if in fact this is the type of test that would measure what they do.").[3]

b. In a written opinion, the district court declined to enforce the Commission's subpoena insofar as it sought test-takers' identifying information. Pet. App. 18-33. The court wrote that there was "little dispute that Ochoa is an 'aggrieved party' within the meaning of [Title VII] and that the charge gives the E.E.O.C. jurisdiction to investigate [whether] the [test] discriminates on the basis of gender." *Id.* at 25.

The district court concluded, however, that test-takers' pedigree information was "not relevant at this stage to a determination of whether the [test] systematically discriminates on the basis of gender." Pet. App. 29. The court wrote that the Commission could analyze whether the test was discriminatory without contacting test-takers because "[t]he addition of the gender variable" to test data "will enable the E.E.O.C. to determine whether the [test] systematically discriminates on the basis of gender" using statistical analysis. *Ibid.* It suggested that if statistical analysis indicated

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[3] The Commission also submitted a sworn affidavit from an official overseeing the office responsible for the investigation of Ochoa's charge, noting that the data the Commission had received from petitioner indicated a substantial disparity in strength-test outcomes for male and female employees—with slightly more than 88% of males passing, while just under 60% of females did so. J.A. 485; see J.A. 479-486. That difference satisfied the gauge of disparate impact known as the "four-fifths" rule. J.A. 485-486; see 29 C.F.R. 1607.4(D) (explaining "four-fifths" rule).

a disparate impact, "[a]t that point, pedigree information may become relevant to an investigation and the [Commission] may find it necessary to seek such information." *Id.* at 30.[4]

Without addressing the parties' arguments concerning the portion of the Commission's subpoena seeking disclosure of the reasons for the terminations of the employees who were fired after taking strength tests, the district court did not order disclosure of those reasons.[5] See Pet. App. 32-33.

c. A unanimous panel of the court of appeals reversed the district court's decision in part, vacated the decision in part, and remanded for further proceedings. Pet. App. 1-17.

The court of appeals noted that under circuit precedent, it reviewed "the district court's resolution of these issues de novo." Pet. App. 8. It observed, however, that "[w]hy we review questions of relevance and undue burden de novo is unclear." *Id.* at 8 n.3. It noted that in the "related context" of reviewing protective orders on the scope of an administrative subpoena, it applied abuse-of-discretion review. *Ibid.* (citing *McLaughlin* v. *Service Emps. Union, AFL-CIO, Local 280*, 880

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[4] The district court dismissed the statistical evidence of disparate impact that the Commission put before the court on the ground that petitioner "has not yet produce[d] all of the requested information" to the EEOC, "most importantly whether an adverse employment decision occurred within 90 days of taking the test." Pet. App. 30 n.1.

[5] The district court also concluded that the Commission was not entitled to seek evidence of disability discrimination based on Ochoa's charge because Ochoa neither claimed to be disabled nor stated that she brought her charge on behalf of a disabled person. Pet. App. 25-27. The Commission did not appeal that portion of the district court's decision. *Id.* at 5 n.1.

F.2d 170, 174 (9th Cir. 1989)). And it observed that other courts "appear to review issues related to enforcement of administrative subpoenas for abuse of discretion." *Ibid.*

The court of appeals then concluded that the district court had erred in refusing to enforce the subpoena for pedigree information on the ground that the information was "not relevant at this stage of the EEOC's investigation." Pet. App. 9. To the contrary, the court of appeals explained, in an investigation of a charge "that [petitioner's] use of the strength test discriminates on the basis of sex," contacting others "who have taken the test to learn more about their experiences" would "cast light on the allegations against [petitioner]—whether positively or negatively." *Id.* at 10. "To take but one example," the court explained, the Commission "might learn through such conversations that other female employees have been subjected to adverse employment actions after failing the test when similarly situated male employees have not." *Ibid.* Alternatively, the court noted, it "might learn the opposite." *Ibid.* "Either way," the court explained, "the EEOC will be better able to assess whether use of the test has resulted in a 'pattern or practice' of discrimination." *Ibid.*

The court of appeals explained that the contrary conclusions of petitioner and the district court rested on misapprehensions of statutory standards or of Ochoa's charge. Petitioner's contention that the pedigree information was irrelevant because Ochoa's charge alleged only "disparate impact" was "wrong," the court explained, because Ochoa's charge alleged sex discrimination through use of the strength test, but "does not allege discrimination based on any particular legal the-

ory, and it did not need to do so." Pet. App. 10-11 (citation omitted).

The court of appeals next rejected petitioner's contention that pedigree information enabling the Commission to contact those who took the test was not "relevant" to Ochoa's charge because "given all of the other information [petitioner] has produced, the EEOC cannot show that production of the pedigree information is 'necessary' to complete its investigation." Pet. App. 11. The court explained that this argument misconstrued the governing legal standard, which is relevance, "not 'necessity.'" *Ibid.*; see *ibid.* ("The EEOC does not have to show a 'particularized necessity of access, beyond a showing of mere relevance,' to obtain evidence.") (quoting *University of Pa.*, 493 U.S. at 188).

The court of appeals explained that the district court's conclusion that the pedigree information was irrelevant rested upon a similar, "invalid" conception of relevance. Pet. App. 12. It noted the district court had reasoned that the pedigree information sought by the EEOC was "irrelevant 'at this stage'" because the EEOC could first conduct a statistical analysis "to determine whether the [strength test] systematically discriminates on the basis of gender." *Ibid.* (brackets in original). In other words, the court explained, the district court appeared to find the pedigree information irrelevant on the theory "that the EEOC did not really need pedigree information to make a preliminary determination as to whether the use of the strength test has resulted in systemic discrimination." *Ibid.* That was error, the court of appeals explained, because "[t]he EEOC's need for evidence—or lack thereof—simply does not factor into the relevance determination." *Ibid.*

Finally, in rejecting petitioner's request to withhold social security numbers, the court of appeals observed that those identifiers would "help[] the EEOC determine whom to contact to learn more about [petitioner's] use of the test," and that petitioner did not press an undue burden argument. Pet. App. 14. Accordingly, the court concluded, the EEOC was entitled to the pedigree information it sought. *Ibid.*

As to the second class of information in dispute—petitioner's reasons for terminating employees who had taken strength tests—the court of appeals vacated the district court's decision and remanded the case. Pet. App. 15-16. The court noted that the district court had not addressed the parties' arguments concerning that data, which involved whether production would constitute an undue burden, and concluded that the district court should consider those arguments in the first instance.[6] *Id.* at 14-15.

SUMMARY OF ARGUMENT

A district court's decision on whether to enforce a Title VII administrative subpoena is subject to abuse-of-discretion, rather than de novo, review. The Ninth Circuit correctly ordered enforcement of the EEOC's subpoena for pedigree information in this case, however, because the district court's refusal to enforce the subpoena rested on a legal error, and, under the correct legal standard, refusing to enforce the subpoena would constitute an abuse of discretion.

I. Absent an "explicit statutory command," whether a district court's decision is subject to deferential or

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[6] In a concurrence, Judge Milan D. Smith urged the EEOC to consider precautions to safeguard sensitive identity information, such as social security numbers. Pet. App. 16-17.

more searching review depends on the "history of appellate practice" and on considerations related to "the sound administration of justice." *Pierce* v. *Underwood*, 487 U.S. 552, 558-560 (1988). A history of appellate practice, reinforced by statutory text and by considerations of the sound administration of justice, supports abuse-of-discretion review of district courts' subpoena-enforcement decisions under Title VII.

A. Courts of appeals have all but uniformly applied abuse-of-discretion review to subpoena-enforcement decisions under the NLRA and Title VII, as well as to enforcement decisions under similar administrative-subpoena provisions. And courts likewise apply deferential review to enforcement decisions concerning pretrial and grand jury subpoenas. That established appellate tradition is a strong indication that abuse-of-discretion review governs decisions regarding whether to enforce EEOC subpoenas issued under Title VII.

The text of Title VII, when read in light of judicial precedent, confirms that an abuse-of-discretion standard applies. Congress directed that the NLRA's subpoena-enforcement procedures should apply to subpoena enforcement under Title VII, 42 U.S.C. 2000e-9, at a time when the NLRA was uniformly construed to impose abuse-of-discretion review on subpoena-enforcement decisions. Because Congress is presumed to be familiar with relevant judicial precedent, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 382 n.66 (1982), Congress's decision to incorporate NLRA procedures is strong evidence that Congress intended that abuse-of-discretion review should govern subpoena enforcement under Title VII, as well.

B. Abuse-of-discretion review is also consistent with "the sound administration of justice." *Pierce*, 487 U.S. at 559.

Issues related to subpoena enforcement turn largely on the sorts of case-specific assessments for which searching appellate review would provide only limited benefits. With respect to relevance, whether specific materials "might cast light on the allegations against the employer" contained in a charge, *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 69 (1984), involves consideration of the relationship between particular materials being sought from a particular employer and the particular matter under investigation. It thus involves the type of "fact-intensive" assessment of "unique factors" that is best suited to the district courts, *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 404 (1990), particularly because of the "impracticability of formulating a rule of decision" concerning subpoena enforcement, *Pierce*, 487 U.S. at 561, beyond the standard provided in *Shell Oil*. Other issues, such as whether a subpoena imposes an undue burden, involve similarly case-specific judgments.

De novo review would also lead to a greater number of appeals, delaying the resolution of cases. But quick resolution of subpoena-enforcement actions is integral to administrative-subpoena schemes, because delays in the enforcement of subpoenas impede investigations and undermine enforcement of the underlying statute. Indeed, this Court has made clear that interpretations of Title VII that "substantially slow the process by which the EEOC obtains judicial authorization to proceed with [subpoena-based] inquiries," are inconsistent with the statute's objectives. *Shell Oil*,

466 U.S. at 81; see *University of Pa.* v. *EEOC*, 493 U.S. 182, 194 (1990).

II. The court of appeals' decision to order enforcement of the EEOC's subpoena for pedigree information without a remand was correct under an abuse-of-discretion standard of review.

A. The district court's refusal to enforce the EEOC's subpoena for identifying information concerning test-takers was an abuse of discretion because it rested on a legally "invalid" understanding of relevance. Pet. App. 12. The district court denied enforcement of the EEOC's subpoena for pedigree information because it concluded —as petitioner had asserted—that the EEOC did not yet need the information it sought. That was error because "[t]he EEOC's need for the evidence—or lack thereof—simply does not factor into the relevance determination." *Ibid.*

B. Under an abuse-of-discretion standard, there is no need for a remand when "the record permits only one resolution" of the issue at hand. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-292 (1982). That standard is satisfied here, because, under the correct legal standard, a district court would abuse its discretion in finding irrelevant the information that would enable the EEOC to interview those who were subjected to the challenged employment practice.

Such information is relevant to investigating disparate treatment because contacting other test-takers would shed light on whether petitioner was using strength tests in the same manner for male and female employees, or was instead treating male and female (or pregnant and non-pregnant) individuals differently. Pet. App. 10. A pattern of treating female employees differently from male employees would "cast light,"

Shell Oil, 466 U.S. at 69, on the allegation of discrimination here, see, *e.g.*, *Young* v. *United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

Information that would enable the Commission to contact test-takers is equally relevant to whether petitioner's strength-testing requirements exerted an unlawful disparate impact. Whether an employer's policy exerts an unlawful disparate impact depends in part on whether—as petitioner has consistently asserted—the employer's practice is justified by business necessity. Communication with those whom petitioner required to take strength tests is relevant to that determination because it sheds light on whether the strength tests that petitioner required are a fair gauge of the abilities that are necessary to work in petitioner's grocery division. Because the information sought by the EEOC was plainly relevant, the court of appeals properly ordered enforcement of the EEOC's subpoena.

ARGUMENT

District courts' decisions whether to enforce administrative subpoenas, including subsidiary determinations of relevance, are properly reviewed for abuse of discretion. But while the court of appeals therefore erred in applying de novo review to the subpoena-enforcement decision in this case, no remand is necessary here, because the court of appeals was correct to order enforcement of the EEOC's subpoena without further delay, even under an abuse-of-discretion standard.

I. A DISTRICT COURT'S DECISION WHETHER TO ENFORCE AN EEOC SUBPOENA IS PROPERLY REVIEWED FOR ABUSE OF DISCRETION

Pierce v. *Underwood*, 487 U.S. 552 (1988), set forth a framework for determining whether a district court's decision is subject to deferential abuse-of-discretion review or to more searching scrutiny. *Pierce* explained that questions of law are reviewed de novo, questions of fact are reviewed for clear error, and "matters of discretion" are reviewed for abuse of discretion. *Id.* at 558. When the abuse-of-discretion standard applies, it "does not preclude an appellate court's correction of a district court's legal or factual error," because "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Highmark, Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 n.2 (2014) (quoting *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990)).

Whether a determination is a matter of discretion, *Pierce* explained, will turn in "some few" cases on an "explicit statutory command"; "for most other[]" cases on "a long history of appellate practice," 487 U.S. at 558; and, otherwise, on indirect cues from the statutory framework and on consideration of whether "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question," *id.* at 559-560 (citation omitted). Under *Pierce*'s framework, abuse-of-discretion review appropriately governs decisions regarding whether to enforce EEOC subpoenas and subsidiary relevance determinations.

A. Longstanding Practice, Reinforced By Statutory Text, Supports An Abuse-Of-Discretion Standard

As *Pierce* noted, unless a decision is one of the "few trial court determinations" for which there exists a "clear statutory prescription," whether a determination is reviewed for abuse of discretion depends in most cases on historical practice. 487 U.S. at 558. Here, neither Title VII nor the National Labor Relations Act provisions that Title VII incorporates contains any "relatively explicit statutory command" concerning the standard of review, *ibid.*; see 42 U.S.C. 2000e-9; 29 U.S.C. 161(1)-(2). As a result, history properly informs the standard.

1. A "long history of appellate practice," *Pierce*, 487 U.S. at 558, supports abuse-of-discretion review for district courts' decisions regarding whether "the court's process" may be "invoked to enforce [an] administrative summons" requiring the production of records, *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964).

With respect to the NLRA, a consensus in favor of abuse-of-discretion review of subpoena-enforcement decisions was settled years before the NLRA's subpoena-enforcement provisions were incorporated into Title VII in 1972. The Sixth Circuit was the first court of appeals to conclude that abuse-of-discretion review governed determinations whether to enforce administrative subpoenas under the NLRA—holding just six years after the NLRA's enactment that "[t]he enforcement of the subpoena is * * * confided to the discretion of the District Court," and that appellate review "extends no further than the determination as to whether or not there was an abuse of [the district court's] discretion." *Goodyear Tire & Rubber Co.* v. *NLRB*, 122 F.2d 450, 453-454 (1941). The Seventh Circuit

followed suit four years later—holding that both the decision whether to enforce the subpoena and the subsidiary determination whether documents were "relevant" were subject to abuse-of-discretion review. *NLRB* v. *Northern Trust Co.*, 148 F.2d 24, 29 (1945) (stating that abuse-of-discretion review applied to enforcement decision, before finding employer could not meet the "burden of showing an abuse of discretion" in part because the district court did not abuse its discretion in "conclud[ing] that the documents which the Board wanted to be produced were relevant"), cert. denied, 326 U.S. 731 (1945). And the Second and Third Circuits followed suit in 1968 and 1965, respectively. *NLRB* v. *Consolidated Vacuum Corp.*, 395 F.2d 416, 419-420 (2d Cir. 1968) ("The test on review here is 'abuse of discretion.'"); *NLRB* v. *Friedman*, 352 F.2d 545, 547 (3d Cir. 1965) (adopting *Goodyear*).

Courts of appeals have also all but uniformly applied abuse-of-discretion review to administrative-subpoena enforcement decisions under other federal statutes, including Title VII. See *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 295-296 (3d Cir. 2010) (ADA case), rev'd and remanded, 694 F.3d 351 (3d Cir. 2012); *EEOC* v. *Randstad*, 685 F.3d 433, 442 (4th Cir. 2012) (Title VII case); *United States* v. *Chevron U.S.A., Inc.*, 186 F.3d 644, 647 (5th Cir. 1999) (administrative subpoena issued by Department of Interior); *EEOC* v. *Roadway Express, Inc.*, 261 F.3d 634, 638 (6th Cir. 2001) (Title VII case); *EEOC* v. *Quad/Graphics, Inc.*, 63 F.3d 642, 644-645 & n.1 (7th Cir. 1995) (Title VII case); *United States EEOC* v. *Technocrest Sys., Inc.*, 448 F.3d 1035, 1038 (8th Cir. 2006) (Title VII case); *EEOC* v. *Dillon Companies, Inc.*, 310 F.3d 1271, 1274 (10th Cir. 2002) (ADA

case); *FTC* v. *Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 148 (D.C. Cir. 2015) (Federal Trade Commission subpoena), cert. denied, 136 S. Ct. 925 (2016); see also *EEOC* v. *Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 760 (11th Cir. 2014) (per curiam) (ultimate decision whether to enforce subpoena in light of benefits and "such equitable criteria as reasonableness and oppressiveness" reviewed for abuse of discretion).[7] The Ninth Circuit is the only court of appeals to take a different approach—doing so with virtually no explanation and without consideration of either historical practice or the functional factors that this Court has also considered in standard-of-review analysis. *United States EPA* v. *Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 445-446 (1988).

Courts of appeals have also consistently applied deferential review to underlying relevance determinations

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[7] No conflict exists between these decisions and the decisions recognizing that district courts should themselves defer to agency appraisal of relevance unless they are "obviously wrong." See, *e.g.*, *Director* v. *Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997); *RNR Enters. Inc.* v. *SEC*, 122 F.3d 93, 97 (2d Cir.), cert. denied, 522 U.S. 958 (1997); *EEOC* v. *Lockheed Martin Corp.*, 116 F.3d 110, 113 (4th Cir. 1997); *EEOC* v. *Recruit U.S.A., Inc.*, 939 F.2d 746 (9th Cir. 1991). The principle that agency assessments of relevance are entitled to significant weight reflects that agencies responsible for conducting investigations in a given area have expertise in what will aid an investigation and that "[t]he scope of the investigation * * * is very much dependent on the agency's interpretation and administration of its authorizing substantive legislation concerning which the agency may enjoy interpretative deference," *Vinson & Elkins*, 124 F.3d at 1307 (citation omitted). But district courts' giving weight to agencies' expert views is not inconsistent with circumscribed appellate scrutiny of determinations that district courts make after according agency views appropriate respect.

in subpoena-enforcement actions—either reviewing for abuse of discretion or using the "clear error" test that this Court has described as comparably deferential. *Cooter & Gell*, 496 U.S. at 400-401 ("In practice, the 'clearly erroneous' standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions. * * * When an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable."). Compare *Kronos*, 620 F.3d at 295-302 (abuse-of-discretion review of relevance), *Roadway Express, Inc.*, 261 F.3d at 641 (same), *EEOC* v. *United Air Lines, Inc.*, 287 F.3d 643, 649 (7th Cir. 2002) (same), *Technocrest Sys., Inc.*, 448 F.3d at 1038 (same), and *EEOC* v. *Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1159 (10th Cir. 2012) (same), with *NLRB* v. *American Med. Response, Inc.*, 438 F.3d 188 (2d Cir. 2006) (clear-error review of relevance), *EEOC* v. *Packard Elec. Div.*, 569 F.2d 315, 317-318 (5th Cir. 1978) (same), and *FTC* v. *Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (same); cf. *Royal Caribbean Cruises, Ltd.*, 771 F.3d at 760 (suggesting a combination of review for legal error and clear-error review applies). Determinations of relevance at trial under Federal Rule of Evidence 401 are correspondingly reviewed for abuse of discretion. *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 388 (2008); *Old Chief* v. *United States*, 519 U.S. 172, 174 n.1 (1997); *United States* v. *Abel*, 469 U.S. 45, 54 (1984).

2. The long history of abuse-of-discretion review for administrative-subpoena-enforcement decisions is reinforced by the treatment of similar forms of judicial process. This Court held in 1974 that abuse-of-

discretion review governs decisions whether to enforce pretrial subpoenas *duces tecum* under Rule 17—embracing the longstanding practice of the courts of appeals. *United States* v. *Nixon*, 418 U.S. 683, 702 ("Enforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues."); see *ibid.* (citing *Sue* v. *Chicago Transit Auth.*, 279 F.2d 416, 419 (7th Cir. 1960); *Shotkin* v. *Nelson*, 146 F.2d 402 (10th Cir. 1944)); see also *United States* v. *Morris*, 451 F.2d 969, 971 (8th Cir. 1971) ("It * * * has long been the rule in this Circuit that compulsory process under" Rule 17 "is not an absolute right but, rather is a matter within the wide discretion of the trial court.") (citations omitted); *Samora* v. *United States*, 406 F.2d 1095, 1099 (5th Cir. 1969) (noting that "[t]he trial judge has wide discretion" in ruling on motions for trial subpoenas); *Margoles* v. *United States*, 402 F.2d 450, 451 (7th Cir. 1968) ("It is clear that a court has discretion to quash a subpoena *duces tecum* if compliance would be unreasonable.").

And courts of appeal have likewise concluded that abuse-of-discretion review applies to decisions whether to enforce grand jury subpoenas—a type of court process that is closely related to administrative subpoenas, *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 216-217 (1946) (describing function of administrative agency issuing subpoena as "essentially the same as the grand jury's"). See *In re Grand Jury Subpoena*, 138 F.3d 442 (1st Cir.), cert. denied, 524 U.S. 939 (1998); *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238 (2d Cir.), cert. denied, 475 U.S. 1108 (1986); *In re Impounded*, 241 F.3d 308, 312 (3d Cir.

2001); *In re Grand Jury Subpoena*, 646 F.3d 159, 164 (4th Cir. 2011); *In re Grand Jury Subpoena*, 696 F.3d 428 (5th Cir. 2012); *In re Grand Jury Subpoenas Duces Tecum*, 695 F.2d 363, 365 (9th Cir. 1982); *In re Grand Jury Proceedings*, 616 F.3d 1186, 1201 (10th Cir. 2010).

3. The text of Title VII reinforces this history. Title VII expressly incorporated the NLRA's subpoena-enforcement mechanisms—specifying that "[f]or the purpose of all * * * investigations conducted by the Commission * * * section 161 of title 29 shall apply," 42 U.S.C. 2000e-9—at a time when subpoena-enforcement decisions under the NLRA were uniformly understood to trigger abuse-of-discretion review. Congress is "presumed to be aware of an administrative or judicial interpretation of a statute." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 382 n.66 (1982). Accordingly, when Congress "adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Ibid.* (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978)). Thus, in *Lorillard*, this Court concluded that when Congress specified that certain ADEA provisions should be enforced in accordance with the "powers, remedies, and procedures" in specified sections of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, and "every court to consider the issue" when the ADEA was enacted had construed the FLSA to provide for jury trials, it was appropriate to treat those sections of the ADEA as incorporating a jury-trial right. 434 U.S. 580; see *id.* at 581-582 & n.7 (relying on three FLSA decisions predating ADEA enact-

ment); see also *Cannon* v. *University of Chi.*, 441 U.S. 677, 694-695 (1979) (finding support for a private remedy in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, because Title IX was "patterned after Title VI of the Civil Rights Act of 1964," and at the time of Title IX's enactment, judicial consensus indicated that Title VI contained a private remedy).

That principle applies here. As noted above, in the decades between the enactment of the NLRA's subpoena-enforcement mechanisms and the incorporation of those NLRA procedures into Title VII in 1972, every court of appeals to address the question had held that subpoena-enforcement decisions under the NLRA were reviewed for abuse of discretion. *Friedman*, 352 F.2d at 547; *Consolidated Vacuum Corp.*, 395 F.2d at 419-420; *Northern Trust Co.*, 148 F.2d at 29; *Goodyear Tire & Rubber*, 122 F.2d at 453-454. Congress's direction that the NLRA framework apply to subpoena enforcement under Title VII, against the backdrop of that uniform NLRA interpretation, is strong evidence that Congress intended abuse-of-discretion review for subpoena-enforcement decisions under Title VII.

B. The Sound Administration Of Justice Favors Abuse-Of-Discretion Review

Practical considerations reinforce that abuse of discretion is the appropriate standard of review for decisions concerning administrative-subpoena enforcement. In deciding whether to apply abuse-of-discretion review, *Pierce* examined whether, "as a matter of the sound administration of justice," a trial or appellate court "is better positioned * * * to decide the issue in question." 487 U.S. at 559-560 (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985)). The considerations on which

this Court has relied in making that assessment support abuse-of-discretion review of enforcement decisions concerning administrative subpoenas, including subsidiary determinations of relevance.

1. In considering whether to apply deferential review to a category of decisions, this Court has considered whether de novo appellate review would carry substantial "law-clarifying benefits," *Pierce*, 487 U.S. at 561, on the one hand, or would instead involve review of case-specific assessments that would "provide only minimal help" in future cases, *Buford* v. *United States*, 532 U.S. 59, 66 (2001). Less searching appellate review is warranted when decisions turn on "multifarious, fleeting, special, narrow facts that utterly resist generalization," *Pierce*, 487 U.S. at 561-562 (citation omitted)—in other words, "fact-intensive, close calls," based on "unique factors," *Cooter & Gell*, 496 U.S. at 404 (citations omitted). There, district courts may be better able to make sound judgments because they "see[] many more" individual claims than appellate courts and are therefore likely to have a better "understanding of the significance of case-specific details." *Buford*, 532 U.S. at 64-65. And intensive appellate review would have only modest value because it would be "impracticab[le] [to] formulat[e] a rule of decision for the matter in issue." *Pierce*, 487 U.S. at 561.

A district court's decision whether to enforce a subpoena, including its subsidiary relevance determination, rests on the sort of case-specific analysis that this Court has indicated counsels in favor of abuse-of-discretion appellate review. Whether specific materials "might cast light on the allegations against the employer" contained in a charge, *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 69 (1984), depends on an analysis of the

relationship between particular materials being sought from a particular employer and the particular matter under investigation. Accordingly, the subpoena-relevancy inquiry is "variable in relation to the nature, purposes, and scope of the inquiry," *Oklahoma Press Publ'g Co.*, 327 U.S. at 209, rather than susceptible to general rules of any greater specificity than the *Shell Oil* standard, cf. *Sprint/United Mgmt. Co.*, 552 U.S. at 387 (explaining that whether a piece of evidence is relevant at trial under the Federal Rules of Evidence is "determined in the context of the facts and arguments in a particular case" and "generally not amenable to broad *per se* rules"); see also Fed. R. Evid. 401 advisory committee's note (28 U.S.C. App. at 864) ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.").

Additional matters that courts consider as part of subpoena-enforcement determinations are also highly case-specific. The questions whether a subpoena is "too indefinite," or "has been made for an illegitimate purpose," *Shell Oil*, 466 U.S. at 72 n.26, and the question whether a subpoena is or is not "unduly burdensome," see Pet. App. 8 (citation omitted), depend on inquiries regarding, respectively, a particular subpoena's language, evidence of improper motive in a particular case, and the burdens of producing particular evidence for a particular employer. Subpoena-enforcement decisions thus turn on "fact-intensive" assessments reflecting "multifarious, fleeting, special, narrow facts that utterly resist generalization," *Cooter & Gell*, 496 U.S. at 404 (quoting *Pierce*, 487 U.S. at 561-562). Accordingly, the "special competence of the district court" in con-

sidering "particular set[s] of individual circumstances" because of the "many more" cases they see, *Buford*, 532 U.S. at 64, and the few "law-clarifying benefits" from searching appellate review, *Pierce*, 487 U.S. at 561, both counsel against de novo review on appeal.

2. While *Pierce* stated that certain types of case-specific determinations might warrant de novo review on appeal because they are unusually consequential, 487 U.S. at 563 (discussing decisions that typically involve large monetary awards), decisions that involve the disclosure of information are not the type one would "expect * * * to be reviewed more intensively" solely because of their consequences, *ibid.* To the contrary, court orders that lead to the disclosure of information are commonly reviewed for abuse of discretion. As noted, *supra*, pp. 23-24, this Court has held that decisions whether to enforce trial subpoenas for documents in criminal cases are reviewable only for abuse of discretion, *Nixon*, 418 U.S. at 701, and this Court has applied the same standard to evidentiary rulings that control whether information is disclosed at trial (including determinations of relevance), *Sprint/United Mgmt. Co.*, 552 U.S. at 384. Settled practice likewise applies abuse-of-discretion oversight to district courts' discovery orders, see Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* § 4.11[4] (4th ed. 2010) (compiling cases), and decisions to enforce grand jury subpoenas, see *supra*, pp. 24-25.

3. In determining standards of review, this Court has also examined whether the more frequent appellate litigation that would result from a de novo standard would undermine a statute's objectives. See *Cooter & Gell*, 496 U.S. at 404. Thus, when considering awards of attorney's fees under the Equal Access to

Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A), this Court drew support for an abuse-of-discretion standard from its determination that a request for fees under the statute "should not result in a second major litigation." *Pierce*, 487 U.S. at 563 (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983)). And the Court similarly concluded in *Cooter & Gell* that "discourag[ing] litigants from pursuing marginal appeals" served the "policy goals" of Federal Rule of Civil Procedure 11, which the Court found supported "reducing the amount of satellite litigation" concerning sanctions. 496 U.S. at 404.

The delays that would result from searching appellate review of subpoena-enforcement decisions weigh heavily against de novo review, because of the importance of speedy enforcement to administrative-subpoena systems generally and Title VII specifically. Just as this Court found "strong governmental interests in * * * avoiding procedural delays" in enforcement of grand jury subpoenas because delays "would assuredly impede [the grand jury's] investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws," *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292, 299, 302 (1991), courts have consistently recognized that delays in enforcement of administrative subpoenas frustrate investigations and undermine enforcement, see, *e.g.*, *Goodyear Tire & Rubber*, 122 F.2d at 451 (concluding that enforcement proceedings should be "of a summary nature," in order to avoid "great delay" before the material sought by the agency is disclosed); *Bowles* v. *Bay of N.Y. Coal & Supply Corp.*, 152 F.2d 330, 331 (2d Cir. 1945); see also, *e.g.*, *United Air Lines, Inc.*, 287 F.3d at 649; *EEOC* v. *Roadway Ex-*

press, Inc., 750 F.2d 40, 42 (6th Cir. 1984) (per curiam); *In re EEOC*, 709 F.2d 392, 396 (5th Cir. 1983).

Moreover, swift enforcement is a critical objective of Title VII itself. Congress made that clear by directing district courts to "assign [a Title VII] case for hearing at the earliest practicable date and to cause the case to be in every way expedited." 42 U.S.C. 2000e-5(f)(5); see 42 U.S.C. 2000e-6(b) (same). And this Court's decisions addressing subpoena enforcement under Title VII have correspondingly recognized that swift enforcement of subpoenas is an important part of the statute's design. Thus, in rejecting the robust notice requirements sought by an employer in *Shell Oil*, this Court emphasized that the proposed requirements were undesirable because they would lead to additional litigation that would "substantially slow the process by which the EEOC obtains judicial authorization to proceed with its inquiries." 466 U.S. at 81. The Court invoked its cautionary statement that "judicial review of early phases of an administrative inquiry results in 'interference with the proper functioning of the agency,' and 'delay[s] resolution of the ultimate question whether the Act was violated.'" *Id.* at 81 n.38 (brackets in original) (quoting *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 241-243 (1980)). And the Court warned against opening avenues that would "place a potent weapon in the hands of employers * * * who wish * * * to * * * delay as long as possible investigations by the EEOC." *Id.* at 81. *University of Pennsylvania* v. *EEOC*, 493 U.S. 182 (1990), likewise emphasized that litigation delays undercut Title VII enforcement—concluding that a proposal that the Commission be required to "demonstrate a 'specific reason for disclosure'" of information was

undesirable because it would amount to a "litigation-producing obstacle" that might result in delays that "frustrate[] the EEOC's mission." *Id.* at 194.

Indeed, more frequent satellite litigation undermines Title VII not only because of the delays that satellite litigation engenders but also because of the resources that it consumes. This Court has explained that "[t]he 'primary objective' of Title VII is to bring employment discrimination to an end." *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 228 (1982) (citation omitted). The EEOC, it has noted, bears "[p]rimary responsibility" for achieving that objective, *Shell Oil*, 466 U.S. at 61-62, through the use of a "multi-step procedure" of investigation, conciliation and (if necessary) filing discrimination suits, *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1647 (2016). Because the Commission has finite resources, however, see, *e.g.*, J.A. 481 (noting Commission's Phoenix office had 26 investigators to investigate about 3200 charges per year), rules that encourage "marginal appeals" spawning "satellite litigation," *Cooter & Gell*, 496 U.S. at 404, diminish the resources available for the agency's core enforcement responsibilities.

Finally, an abuse-of-discretion standard does not impair Title VII's operation by preventing effective appellate oversight or necessitating a surfeit of remands for district courts to exercise discretion. When a district court applies a relevance standard other than the "not especially constraining" rule of *Shell Oil*, 466 U.S. at 66, abuse-of-discretion review permits the court of appeals to correct that error of law, *Highmark*, 134 S. Ct. at 1748 n.2 ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law") (citation omitted). And because

Title VII's relevance standard reaches "virtually any material that might cast light on the allegations against the employer," *Shell Oil*, 466 U.S. at 68-69, when the usefulness of subpoenaed information to an investigation is plain—so that a district court would abuse its discretion by finding irrelevance—courts can (and do) order subpoenas enforced without the further delay of a remand. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982) (explaining that there is no need for a remand when "the record permits only one resolution" of a question); see also, *e.g.*, *Randstad*, 685 F.3d at 448; *Kronos*, 620 F.3d at 299; *EEOC* v. *United Parcel Serv.*, 587 F.3d 136, 139-140 (2d Cir. 2009). Abuse-of-discretion review therefore does not lead to inappropriate divergence in the legal principles governing Title VII actions or to frequent delay based on a need for remands.

II. ENFORCEMENT OF THE EEOC'S SUBPOENA FOR PEDIGREE INFORMATION WAS PROPER UNDER AN ABUSE-OF-DISCRETION STANDARD

The court of appeals' decision to order enforcement of the EEOC's subpoena without a remand was correct under an abuse-of-discretion standard of review. Because the district court applied an incorrect understanding of relevance in refusing to enforce the EEOC's subpoena on relevance grounds, the district court's decision was an abuse of discretion. See *Highmark*, 134 S. Ct. at 1748 n.2; *Koon* v. *United States*, 518 U.S. 81, 100 (1996). And because, in addition, a court would abuse its discretion by concluding that the pedigree information sought by the EEOC did not satisfy the liberal *Shell Oil* standard of relevance, no remand for further proceedings is necessary. See *Swint*, 456 U.S. at 291-292.

A. The District Court Abused Its Discretion When It Declined To Enforce The EEOC's Subpoena For Pedigree Information Based On An Erroneous Understanding Of Relevance

The district court's refusal to enforce the EEOC's subpoena for pedigree information on relevance grounds was an abuse of discretion because, as the court of appeals observed, it rested on a misunderstanding of the legal standard of "relevance" under Title VII. Pet. App. 12; see *Koon*, 518 U.S. at 100 (explaining that the "abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions" because a district court "by definition abuses its discretion when it makes an error of law"). Before the district court, the Commission explained that test-takers' identifying information was relevant because it would shed light on whether petitioner's strength test reflected actual job requirements (as relevant to disparate impact), and whether petitioner applied the testing regime even-handedly to men and women (as relevant to disparate treatment). J.A. 506-509. Petitioner advanced a different conception of relevance, asserting that pedigree information was not relevant because it was not necessary to the EEOC's investigation. J.A. 518 ("They don't need it on a disparate treatment test, and they don't need it on a disparate impact."); J.A. 517 (contending that the EEOC could "run a disparate impact analysis" with the data that petitioner had already produced concerning "gender[,] test dates[,] reasons for test[,] the results of the test" and whether an adverse job action occurred within 90 days).

The district court adopted petitioner's legal approach, concluding that the pedigree information

sought by the EEOC was not relevant because the EEOC could conduct its investigation by first performing statistical analysis of the testing requirement. Pet. App. 28-30. It reasoned that test-takers' information was "not relevant *at this stage* to a determination of whether the [strength test] systematically discriminates on the basis of gender" because "[t]he addition of the gender variable will enable the E.E.O.C. to determine whether the [strength test] systematically discriminates on the basis of gender." *Id.* at 29 (emphasis added). It then stated that after the Commission made that preliminary determination, "pedigree information may *become* relevant to an investigation and the [Commission] may find it necessary to seek such information." *Id.* at 30 (emphasis added).[8]

As the court of appeals explained, the district court's basis for deeming pedigree information irrelevant was "invalid," Pet. App. 12, because it rested on a mistaken understanding of the legal standard for relevance. While the district court "appeared to conclude that the EEOC did not really *need* pedigree information to make a preliminary determination as to whether use of the strength test has resulted in systemic discrimination" because the EEOC could first use statistical analysis to shed light on the charge, "[t]he EEOC's need for the evidence—or lack thereof—simply does

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[8] The district court also dismissed the evidence the Commission submitted of a significant statistical disparity in strength-test results for male and female test-takers, see p. 10 note 3, *supra*, on the grounds that petitioner was still in the process of producing information to the Commission, Pet. App. 30. The district court did not separately address the Commission's explanation that the pedigree information was relevant to determining whether petitioner implemented its strength-test program in a manner that constituted disparate treatment. *Id.* at 28-30.

not factor into the relevance determination." *Ibid.* (emphasis added). That is plain from *Shell Oil*, which imposed no necessity test and instead explained that the EEOC was entitled to use subpoenas to obtain "virtually any material that might cast light on the allegations against the employer." 466 U.S. at 68-69. And it is reinforced by *University of Pennsylvania*, which declined to require a "judicial finding of particularized necessity" prior to enforcement of even a subset of EEOC subpoenas—those seeking "confidential peer review materials"—because that requirement would be inconsistent with "the plain language of the text of § 2000e-8(a), which states that the Commission '*shall* . . . *have* access' to 'relevant' evidence." 493 U.S. at 192.[9]

Petitioner's defense of the district court's reasoning lacks merit. Petitioner errs in contending (Br. 32-34) that the district court did not actually adopt the need-based understanding that petitioner had pressed before the district court, and that the court may have simply regarded an agency's need for certain information as evidence of the information's relevance. The district court's conclusion that the EEOC could first conduct statistical analysis was the *reason* the court concluded that, "at this stage," pedigree data was not relevant. Pet. App. 29-30 (noting that EEOC

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[9] Petitioner suggests (Br. 33) that *University of Pennsylvania* is irrelevant because it "dealt with the scope of a peer review privilege, not the EEOC's subpoena power." But the Court declined to recognize a peer-review privilege in *University of Pennsylvania* precisely because it concluded that the proposed privilege (requiring a showing of necessity in some cases) was inconsistent with EEOC's broad subpoena power, which requires a showing of relevance but not necessity. 493 U.S. at 192.

could perform statistical analysis; that if the statistical analysis indicated a disparity, "[a]t that point, pedigree information may become relevant to an investigation"; and that "[c]*onsequently*, the [Commission's] application * * * is denied") (emphasis added). That explanation rested entirely on the court's perception that the EEOC did not yet need the pedigree information. Moreover, the district court offered no other explanation—beyond the erroneous need requirement that petitioner urged it to adopt—for why, in its view, the materials the Commission sought would not shed light on the charge under investigation.[10] The court of appeals was thus correct in concluding that the basis for the district court's determination of irrelevance was legally "invalid." *Id.* at 12.

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[10] As an additional possible basis for the district court's conclusion that pedigree information was irrelevant, petitioner points (Br. 31) to the court's statement that "[j]udging by the [Commission's] filings and the discussion at the hearing, the primary motivation for obtaining the pedigree information related to the ADA charge." Pet. App. 28. But the EEOC sought the pedigree information to investigate both Title VII and ADA claims. See J.A. 507-510. Whether the EEOC's "primary" motive related to one claim or another has no bearing on whether the information the Commission sought was *relevant* to the ADA claim, the Title VII claim, or to both. And the district court justifiably did not make any finding that the EEOC acted with an improper motive. See *Powell*, 379 U.S. at 58 (explaining that abuse of process would occur if a summons were issued "for an improper purpose, such as to harass the [subpoena recipient] or to put pressure on him to settle a collateral dispute," but that "[t]he burden of showing an abuse of the court's process is on the" subpoena recipient).

B. Under An Abuse-Of-Discretion Standard, No Remand To The District Court Was Necessary

When a district court decision that is reviewable for abuse of discretion is premised on "an erroneous view of the law," there is no need for a remand to the district court to exercise its discretion under the correct legal framework if "the record permits only one resolution" of the issue at hand. *Swint*, 456 U.S. at 292. Applying that principle here, there is no need for a remand that would delay enforcement of a plainly valid subpoena to obtain information that the Commission has now sought from petitioner for more than seven years. See J.A. 62-66 (August 2009 EEOC request); J.A. 79-92 (August 2010 request); J.A. 379-391 (November 2010 request); J.A. 92-106 (February 2011 subpoena).

1. Pedigree information that would enable the Commission to contact test-takers is clearly relevant to the EEOC's investigation of disparate treatment. As the court of appeals explained, contacting other test-takers would shed light on whether petitioner was using strength tests in the same manner for male and female employees, or was instead treating male and female (or pregnant and non-pregnant) individuals differently. Pet. App. 10. To take "one example," "the EEOC might learn through such conversations that other female employees have been subjected to adverse employment actions after failing the test when similarly situated male employees have not. Or it might learn the opposite." *Ibid.*; cf. *Merritt* v. *Old Dominion Freight Line, Inc.*, 601 F.3d 289, 296-297 (4th Cir. 2010) (disparate-treatment case involving evidence that an employer terminated a female employee for failing a

physical ability test, but used the test "selectively, excusing injured male employees" from taking it).

A pattern of treating female applicants or employees differently from male employees with respect to the use of strength tests would cast light on whether petitioner's firing of Ochoa reflected disparate treatment on the basis of gender. *Young* v. *United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015) (prima facie case of pregnancy discrimination under Title VII supported by evidence that employer did not accommodate pregnant employee but "did accommodate others 'similar in their ability or inability to work'"); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805 (1973) (noting that evidence "as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks"); see *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998) (explaining that to prove harassment is "because of . . . sex," a plaintiff may "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace"); *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355, 358 (6th Cir. 1969) ("We consider an employer's 'pattern of action' relevant to the Commission's determination of whether there is reasonable cause to believe that the employer has practiced racial discrimination * * * and the existence of patterns of racial discrimination in job classifications or hiring situations other than those of the complainants may well justify an inference that the practices complained of here were motivated by racial factors."); see also *Shell Oil*, 466 U.S. at 69 & n.20 (stating that Congress in 1972 "implicitly endorsed" the understanding of rele-

vance accepted in lower courts, and citing *Blue Bell Boots*).

Petitioner nevertheless contends (Br. 44) that evidence relevant to disparate treatment does not bear on Ochoa's charge, because a disparate-treatment theory "would seem to be inconsistent with" Ochoa's charge stating that all employees returning from leave were required to take a strength test. But as the court of appeals explained, that claim of inconsistency is flatly incorrect: While "Ochoa alleges that [petitioner] requires all employees returning from medical leave to take the strength test before they can return to work," she did "not allege that the test is neutrally *applied*." Pet. App. 13. Instead, Ochoa alleged that petitioner's termination of her employment after she did not pass the strength test constituted gender discrimination—without specifying (or ruling out) a disparate-impact or disparate-treatment theory of how that discrimination occurred. *Ibid.*[11] Evidence concerning whether or not petitioner used the strength test differently with respect to male and female employees would thus shed light on the charge that Ochoa set out: that she "ha[d] been discriminated against because of [her] sex, female," when she was fired after failing the test. J.A. 42-43.

Nor is petitioner correct to contend (Br. 45) that contacting test-takers outside of the facility where Ochoa worked could not shed light on whether Ochoa was

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[11] As the court below noted (Pet. App. 11), and petitioner concedes (Br. 44), there is no legal requirement that a person filing a charge of discrimination with the EEOC specify a particular legal theory. See 29 C.F.R. 1601.12(b); see also *Shell Oil*, 466 U.S. at 68 ("[A] charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit.").

subjected to disparate treatment. Petitioner asserted that Ochoa's firing did not reflect disparate treatment based on gender or pregnancy because Ochoa was terminated pursuant to a nationwide policy of requiring a strength test of employees who returned from leave and firing those who did not pass the test. See J.A. 51 (company's explanation of nationwide policy); J.A. 55 (company's explanation that Ochoa was terminated "in accordance with [petitioner's] policies and procedures" after being unable to pass the strength test); see also Pet. App. 4. Under those circumstances, it was highly relevant to the EEOC's investigation of the Ochoa charge whether petitioner had in fact implemented a nationwide policy of the type that petitioner described and whether petitioner applied that policy equally to men and women. *Kronos*, 620 F.3d at 297-299 (concluding that "[a]n employer's nationwide use of" a particular test for job applicants "supports a subpoena for nationwide data on that practice" in an EEOC investigation of disability discrimination); *United Parcel Serv., Inc.*, 587 F.3d at 139-140 (explaining that because UPS's Appearance Guidelines "apply to every UPS facility in the country," information regarding "how religious exemptions to the UPS Appearance Guidelines are (or are not) granted nationwide" was relevant in investigation of individual charges of religious discrimination based on failure to provide exemptions). Evidence of whether petitioner's nationwide employment rules for its grocery division were applied evenhandedly to men and women thus would—at a minimum—shed light on Ochoa's claim.

2. The pedigree information that the Commission has sought for years is equally relevant to whether petitioner's strength-testing requirements exerted an un-

lawful disparate impact. Whether petitioner's strength-testing policy violates Title VII on disparate-impact grounds depends not only on whether the policy has a disparate impact, but also on whether—as petitioner has consistently asserted, see, *e.g.*, J.A. 60-61, 340-342—the policy is justified by business necessity. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977); 42 U.S.C. 2000e-2(k)(1)(A). Communications with those whom petitioner has required to take a strength test are relevant to whether use of the test was supported by business necessity, because in determining whether a test "measures actual work functions," information from individuals who took the test and from "people who actually perform these functions at their job" would shed light on whether "this is the type of test that would measure what they do." J.A. 509 (EEOC explanation to district court); see Gov't C.A. Br. 39-44.

Petitioner repeats (Br. 44) its contrary assertion that communication with test-takers would shed no light on whether petitioner's strength-testing requirement "was justified by a legitimate rationale." But the arguments that petitioner has made in support of that position (Pet. C.A. Br. 32-33) lack merit. In the court of appeals, petitioner contended that interviewing those who actually took the test and performed the job functions based on which the test was justified would have no value because the test "is *not* designed to mimic job duties" but instead "evaluates overall strength in shoulders and legs." *Id.* at 32. But that assertion only underscores the relevance of communications with test-takers to shed light on whether a test that does *not* mimic job responsibilities fairly measures the attributes necessary for positions in petitioner's grocery

department. Because pedigree information that would enable the Commission to undertake the rudimentary investigative technique of interviewing test-takers is plainly relevant under *Shell Oil*, and because a district court would abuse its discretion by finding otherwise, no remand for further proceedings is necessary in this case.

3. Finally, no remand is warranted based on petitioner's suggestion (Br. 36-37) that issues regarding the burden of producing pedigree information remain open. As the court of appeals correctly noted, petitioner did not press its argument pertaining to burden at the appellate stage. See Pet. App. 14. Petitioner did not preserve a burden argument, either by asserting burden as an alternative ground for affirmance (in a court applying de novo review to subpoena-enforcement determinations), or by asking the court to remand the case for further proceedings regarding burden if the court found in favor of the EEOC on relevance. See Pet. C.A. Br. 1-49.[12] There is no basis

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[12] Petitioner's failure to preserve that argument is unsurprising. In order to avoid providing the EEOC with names and social security numbers for test-takers, petitioner removed that data from its records. J.A. 450, 475. Petitioner thus expended more resources to withhold that pedigree information than would have been necessary to produce it. And because petitioner maintained a separate, searchable database that contained the additional identifying data that the EEOC sought concerning test-takers who were employees, see J.A. 510-511, 523, petitioner's burden argument concerning pedigree information ultimately centered on the approximately 2000 applicants required to take strength tests, J.A. 448-462, 521-522. After the EEOC explained that the information in the relevant applications could be inputted into a database at little cost, J.A. 487-493, 512-513, the district court advised the parties that if it found the material that the EEOC sought relevant, the burdens of producing applicant data were "not going to

for a remand to address a burden argument that petitioner forfeited.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2016

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convince [the court] that there's enough burden that they don't have to comply," J.A. 523.

APPENDIX

1. 29 U.S.C. 161 provides in pertinent part:

Investigatory powers of Board

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

(1) **Documentary evidence; summoning witnesses and taking testimony**

The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the

Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) Court aid in compelling production of evidence and attendance of witnesses

In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

* * * * *

2. 42 U.S.C. 2000e-2 provides in pertinent part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter * * * if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;

* * * * *

3. 42 U.S.C. 2000e-5 provides in pertinent part:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged

unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that, there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing

of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * * * *

(f) **Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master**

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons ag-

grieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance.

Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * * * *

4. 42 U.S.C. 2000e-8(a) provides:

Investigations

(a) Examination and copying of evidence related to unlawful employment practices

In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

5. 42 U.S.C. 2000e-9 provides:

Conduct of hearings and investigations pursuant to section 161 of title 29

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 shall apply.

RECORD AND BRIEFS

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MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR PETITIONER

The parties now agree on the sole question before this Court—whether a district court's decision to enforce or quash an EEOC subpoena should be reviewed by the court of appeals *de novo* or for an abuse of discretion. Abuse of discretion is the proper standard. See *Cooter & Gell* v. *Hartmarx*, 496 U.S. 384 (1990); *Pierce* v. *Underwood*, 487 U.S. 552 (1988). Because the Ninth Circuit reviewed the district court's decision under the wrong legal standard—*de novo*—the Court should vacate the judgment and remand for consideration under the proper legal standard—abuse of discretion.

The Court-appointed *amicus* valiantly attempts to defend the Ninth Circuit's *de novo* standard on several grounds, none of which work. Primarily, *amicus* contends that the Court should borrow the Fourth Amendment standard used to review motions to suppress evidence, in which courts of appeals divide the district court's ruling into findings of fact and conclusions of law, reviewing the former for clear error and the latter *de novo*. See *Amicus* Br. at 22 (citing *Ornelas* v. *United States*, 517 U.S. 690 (1996)). Even if it were appropriate to look to Fourth Amendment jurisprudence—rather than to *Pierce*, 487 U.S. at 558-60, which controls an appellate court's selection of the appropriate standard of review—*amicus*'s analysis is unpersuasive.

The closest Fourth Amendment analogue to district-court decisions on administrative subpoena

enforcement is not, as *amicus* suggests, motions to suppress evidence (which occur *ex post*), but rather motions to grant search warrants (which, like administrative subpoenas, occur *ex ante*). This Court holds that a trial court's decision to grant a search warrant receives "great deference." *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983) ("[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" (quoting *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969))). And this Court has made clear its preference for a unitary standard of review. E.g., *Cooter*, 496 U.S. at 403.

Notwithstanding its belated agreement with McLane that the Ninth Circuit applied the wrong standard, the government asks this Court to affirm nonetheless on an alternative ground. Br. of United States at 33-44. As an initial matter, this Court may "'decline to entertain[]' alternative grounds for affirmance," *United States* v. *Tinklenberg*, 563 U.S. 647, 661 (2011) (citation omitted), particularly where, as here, the issue is a "fact-sensitive" one. E.g., *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1653 (2016) (rejecting EEOC's argument for affirmance on an alternative ground because "this is not an appropriate case to reach and settle this fact-sensitive issue"). What is more, given the procedural posture of this case, this Court can only affirm, as the government correctly recognizes, if the government carries its burden of demonstrating that the record in this case admits of

only *one* conclusion. The government cannot make that showing. If anything, the government's argument for affirmance only underscores that trial courts are best positioned to evaluate the facts and—as this case exemplifies—shifting rationales for an agency's actions. The government's argument underscores the wisdom of leaving that fact-sensitive work to trial courts, as McLane and its *amici* have urged.

Accordingly, the Court should hold that the correct standard of review is abuse of discretion, reverse the Ninth Circuit's judgment, and remand for the Ninth Circuit to apply that standard in the first instance. Alternatively, if the Court decides to reach the government's alternative argument for affirmance (or even if it agrees with court-appointed *amicus* on the standard of review), it should reverse the judgment of the Ninth Circuit and render judgment reinstating the judgment of the district court, which did not err—much less abuse its discretion.

I. Appellate Courts Should Review Decisions To Enforce Or Quash Administrative Subpoenas For Abuse Of Discretion.

The government now agrees with McLane and its *amici* that appellate courts should review trial-court determinations on administrative subpoena enforcement for abuse of discretion. See Br. of United States at 15-16, 19-33. As set forth in McLane's merits brief (at 18-29), this conclusion follows from the statutory

text, this Court's precedent, and practical considerations of judicial economy—as confirmed by longstanding practice in the Courts of Appeals, all of which (save the Ninth) apply a deferential standard of review.

A. This Court's Precedent Confirms That Review Should Be Deferential.

As the government agrees (at 19), this Court's decision in *Pierce* provides the framework for determining the standard of review in this case. The analysis turns on three factors—(1) "the language and structure of the governing statute," (2) the "history of appellate practice," and (3) which judicial actor is best positioned to decide the issue in question. 487 U.S. at 558-60. As McLane demonstrated in its merits brief (at 19-25), each factor points toward the abuse-of-discretion standard here.[1]

First, as McLane explained (at 19-20), the governing statute, 29 U.S.C. § 161(1), provides district courts with the jurisdiction—but not the duty—to enforce subpoenas issued by the EEOC and NLRB. This is a strong indication that Congress intended district

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[1] Court-appointed *amicus* argues that this Court has previously reviewed decisions regarding administrative subpoenas *de novo*. See *Amicus* Br. at 29-31 (citing *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943); *Okla. Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 215-16 (1946); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-53 (1950)). But none of those cases confronted the Court with the question presented here—the *appropriate* standard of review. In all events, the Court did not expressly adopt a *de novo* standard in those cases, so they are of no moment in resolving the question at hand.

courts to exercise discretion in evaluating agency subpoena requests.

Second, the history of appellate practice—which is virtually uniform in applying a deferential standard in these circumstances—likewise strongly favors an abuse-of-discretion standard. See Br. of Pet. at 21-28.

And third, trial courts are best positioned to make the determination, as McLane demonstrated (at 22-25), because the enforcement of administrative subpoenas turns on "multifarious, fleeting, special, narrow facts that utterly resist generalization." See *Pierce*, 487 U.S. at 561-62 (citation omitted); see also *Buford* v. *United States*, 532 U.S. 59, 64-65 (2001) (recognizing that trial courts have a superior "understanding of the significance of case-specific details"); Br. of United States at 27-29 (noting that subpoena enforcement decisions are "highly case-specific").

Each *Pierce* factor thus points in the same direction—toward abuse of discretion as the proper standard for reviewing decisions involving the enforcement of agency subpoena requests. 487 U.S. at 558; Br. of Pet. at 19-29; Br. of United States at 19-33.

This Court's decision in *Cooter & Gell* confirms that conclusion. That case involved Rule 11 sanctions –an inquiry that, as with administrative-subpoena enforcement, could be broken up into factual, legal, and discretionary components. 496 U.S. at 399. Justice Scalia's opinion for the Court noted "the difficulty of distinguishing between legal and factual issues," and acknowledged that Rule 11 requires the

trial court to "consider issues rooted in factual determinations." *Id.* at 401.

The Court thus concluded that "*Pierce* * * * strongly supports applying a unitary abuse-of-discretion standard to all aspects of a Rule 11 proceeding." *Id.* at 403. It is the same here. Whether to enforce an EEOC subpoena is an issue "rooted in factual determinations," such as the scope of the charge, the relevance of the information, and the burden imposed by compliance. A trial court's decision applying the law to factual charges that vary from case to case—or even shift within a case—should therefore be reviewed for abuse of discretion.

Likely recognizing the futility of arguing against that conclusion, court-appointed *amicus* changes the subject, silently jettisoning the *Pierce* framework in favor of a novel, alternative approach. *Amicus* asks this Court to focus instead on "the substantive source of law" which, in *amicus*'s view, would lead to the conclusion that because *some* Fourth Amendment determinations (such as decisions on motions to suppress) receive *de novo* review, so too should decisions on administrative subpoena enforcement.

Underscoring the departure from this Court's precedent that *amicus* urges, this Court did not list the "substantive source of law" among the factors relevant to determining the standard of review in *Pierce*. It is not difficult to see why—the source of law applied by the district court is neither logically nor legally relevant to the standard of review that courts of appeals

should apply. See also *U.S. Dep't of Educ.* v. *Nat'l Collegiate Athletic Ass'n*, 481 F.3d 936, 941-42 (7th Cir. 2007) (rejecting any distinction between "judicial" and "administrative" subpoenas).

Even on its own terms, *amicus*'s argument fails because its conclusion rests on a faulty premise. Although *amicus* is certainly correct that *some* Fourth Amendment decisions—such as *ex post* review of the reasonableness of searches already performed—are subject to *de novo* review, others more closely analogous to administrative subpoena determinations are not—such as magistrate judges' decisions to grant search warrants. As demonstrated next, those Fourth Amendment decisions are reviewed with deference—just as the *Pierce* analysis dictates that decisions on administrative subpoena enforcement should be, too.[2]

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[2] *Amicus* also relies (at 31-32) on Section 6(d) of the Administrative Procedure Act, which requires courts to enforce an administrative subpoena to "the extent that it is found to be in accordance with law." 5 U.S.C. § 555(d). Setting aside whether the APA even applies here (and the sole case cited by *amicus*, *D. G. Bland Lumber Co.* v. *NLRB*, 177 F.2d 555, 558 (5th Cir. 1949), merely holds that in enacting the APA, "Congress intended to leave the scope of judicial inquiry unchanged upon an application for the enforcement of a subpoena"), neither the APA nor the cases construing it indicate whether that "finding" is reviewed *de novo* or deferentially. The sole case cited by *amicus* (at 31) for the proposition that review under the APA is *de novo* concerns general review of agency actions under 5 U.S.C. § 706, not review of district court decisions enforcing or quashing subpoenas under 5 U.S.C. § 555. See *Tenet HealthSystems HealthCorp.* v. *Thompson*, 254 F.3d 238, 244 (D.C. Cir. 2001). In cases concerning subpoenas issued under the APA, the D.C. Circuit holds that "[a] finding by the district court that documents are relevant and necessary to an

B. *Amicus*'s Novel Alternative Framework Confirms That Review Should Be For Abuse Of Discretion.

Understandably abandoning the *Pierce* framework—which virtually compels the conclusion that abuse of discretion is the proper standard here—court-appointed *amicus* argues that because the reasonableness of a search under the Fourth Amendment is reviewed *de novo*, the same standard should apply to trial-court decisions regarding agency subpoena enforcement. *Amicus* Br. at 22-25 (citing *Ornelas*, 517 U.S. 690). Enforcement of administrative subpoenas, however, involves very different considerations. See *Walling*, 327 U.S. at 208-18. The trial court is not being asked to review *ex post* the propriety of a search that has already occurred. It is being asked to determine *ex ante* whether a search may occur.

The closest Fourth Amendment analogue to trial-court decisions regarding administrative subpoena enforcement is not, as *amicus* suggests, a motion to suppress evidence—it is an application for a search warrant. And this Court holds that a trial court's decision to grant a search warrant receives "great deference." *Gates*, 462 U.S. at 236 ("[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de*

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inquiry * * * is essentially factual in nature and cannot be overturned unless the district court's finding is clearly erroneous." *FTC* v. *Lonning*, 539 F.2d 202, 210 n.14 (D.C. Cir. 1976).

novo review. A magistrate judge's 'determination of probable cause should be paid great deference by reviewing courts.'" (quoting *Spinelli*, 393 U.S. at 419)). Even in the Fourth Amendment context invoked by *amicus*, then, this Court holds that the determinations most closely analogous to administrative subpoena enforcement receive deferential review.

C. Whether Subpoena Enforcement Is A Legal Question Does Not Dictate The Proper Standard Of Review.

Amicus is on stronger ground emphasizing (at 13-15, 36-41) that subpoena enforcement is a legal question. But no one disputes that a trial court must apply law in enforcing subpoenas. See Br. of Pet. at 35 (acknowledging that a district court abuses its discretion if it applies the wrong legal standard); Br. of United States at 19 (same). And no one disputes that a trial court must apply law to facts. See *Amicus* Br. at 27 (acknowledging that a district court's determination of facts should be reviewed for clear error). And as McLane has demonstrated (at 37-38 & 41 n.10), this Court has repeatedly favored a unitary "abuse of discretion" review, while recognizing that legal (or factual) error can establish an abuse of discretion. E.g., *Cooter & Gell*, 496 U.S. at 403.

Thus *amicus*'s reliance (at 40, 42-43, 44) on Judge Newman's concurring opinion in *Equal Employment Opportunity Commission* v. *United Parcel Service, Inc.*, 587 F.3d 136, 140-42 (2d Cir. 2009) (Newman, J., concurring), does not advance its cause.

First, as explained in McLane's opening brief (at 37-41), this Court has rejected the proposition that a district court's discretionary decision should be divided into legal and factual questions. See *Koon* v. *United States*, 518 U.S. 81, 100 (1996); *Cooter & Gell*, 496 U.S. at 399.

Second, Judge Newman's concurrence emphasizes that "determining the proper relationship between * * * facts involves application of a legal standard, not a finding of fact" (*UPS*, 587 F.3d at 142 (Newman, J., concurring))—but as this Court has explained, the appropriate standard of review for fact-specific applications of law is abuse of discretion. See, e.g., *Cooter & Gell*, 496 U.S. at 402 ("Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts *and apply the fact-dependent legal standard* * * * *" (emphasis added)).

Third, to the extent Judge Newman's concurrence rests on the premise that district courts have no discretion in enforcing administrative subpoenas, see *UPS*, 587 F.3d at 142 (Newman, J., concurring), the conclusion that review for abuse of discretion is inappropriate does not follow. It is certainly true that *some* decisions—such as matters of trial management—are reviewed for abuse of discretion because they are committed to the district court's discretion.[3] But it is not

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[3] See, e.g., *United States ex rel. D'Agostino* v. *EV3, Inc.*, 802 F.3d 188, 195 (1st Cir. 2015) ("[Denial of a motion for leave to amend] is * * * committed to the sound discretion of the district court, and the relator is entitled to have the district court exercise

true of *all* decisions reviewed for abuse of discretion.[4] As this Court explained in *Pierce*, many decisions applying law to facts should be reviewed for abuse of discretion. 487 U.S. at 559-60. Deferential review is appropriate when "one judicial actor is better positioned than another to decide the issue in question,"

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that discretion under the proper legal standard."); *In re Deepwater Horizon*, 824 F.3d 571, 579-80 (5th Cir. 2016) (per curiam) ("A motion to disqualify [a special master] * * * is committed to the sound discretion of the district judge and is reviewed for abuse of discretion." (internal quotation marks and citation omitted)); *Tripodi* v. *Welch*, 810 F.3d 761, 764 (10th Cir. 2016) ("Because the entry of a default judgment is committed to the sound discretion of the district court, we will not overturn the court's decision without a clear showing that it manifests a clear error of judgment." (internal quotation marks, alteration, and citation omitted)).

[4] For example, trial courts are not "vested with discretion" to decide whether evidence is relevant; whether venue is proper; or whether experts' proposed testimony is reliable. Each of these decisions turns on the application of law to fact. But these decisions are reviewed for abuse of discretion—not because the district court "exercises discretion"—but because they are "multifarious and novel question[s], little susceptible * * * of useful generalization." *Pierce*, 487 U.S. at 562; see also *Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 143 (1997) ("[T]he question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse-of-discretion standard."); *In re C.R. Bard, Inc., MDL. No. 2187, Pelvic Repair Sys. Prods. Liab. Litig.*, 810 F.3d 913, 923 (4th Cir. 2016) ("We review the district court's applications of the hearsay rules, like applications of all Federal Rules of Evidence, for abuse of discretion[.]"); *United States* v. *Real Prop. Known As 200 Acres Of Land Near FM 2686 Rio Grande City*, 773 F.3d 654, 657 (5th Cir. 2014) ("We review all questions concerning venue for abuse of discretion."). "[B]ecause the number of possible situations is large, we are reluctant either to fix or sanction narrow guidelines for the district courts to follow." *Pierce*, 487 U.S. at 562 (quoting *Curtiss-Wright Corp.* v. *Gen. Elec. Co.*, 446 U.S. 1, 10-11 (1980)).

ibid. (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985)); when the district court "may have insights not conveyed by the record," *id.* at 560; when an appellate court acquiring full knowledge of the factual setting may "come at unusual expense," *ibid.*; when *de novo* appellate review will "fail to produce the normal law-clarifying benefits," *id.* at 561; or when a decision is "not amenable to regulation by rule because [it] involve[s] multifarious, fleeting, special, narrow facts that utterly resist generalization," *id.* at 561-62 (citation omitted).

These factors do not establish that a matter is committed to the district court's discretion—they simply mean that a particular application of law to fact should be reviewed with deference on appeal. Thus the emphasis on whether a district court "exercises discretion" in enforcing (or quashing) an EEOC subpoena is beside the point. Whether or not Congress "vested the district court with discretion," *Amicus* Br. at 45, in deciding whether to enforce an EEOC subpoena, the district court applies law to special, narrow, fleeting facts and is far better positioned than the court of appeals to decide the issue. See Br. of Pet. at 21-25. Further, any suggestion that trial courts must *always* defer to the EEOC on the issue of relevance would conflict with this Court's decision in *Equal Employment Opportunity Commission* v. *Shell Oil Co.*, 466 U.S. 54 (1984) and the statutory scheme established by Congress to *limit* the EEOC's investigatory authority (which, unlike that of other administrative agencies, is not plenary).

Finally, *amicus* simply misunderstands McLane's point when asserting (at 57) that review for abuse of discretion would not "mean that an appellate court can dispose of the appeal more speedily." The point, as the government now agrees (at 16), is that *de novo* review would "lead to a greater number of appeals, delaying the resolution of cases." *Amicus* does not, and cannot, dispute that point.

II. The Ninth Circuit's Judgment Cannot Be Affirmed.

A. The Court Should Decline To Entertain The Government's Alternative Ground For Affirmance.

Having abandoned any defense of the Ninth Circuit's *de novo* standard of review, the government now urges this Court to affirm on the alternative ground that the record in this case admits of only one conclusion—that the personal contact information the EEOC seeks is relevant and therefore the district court necessarily abused its discretion in coming to a different conclusion. See Br. of United States at 34-44. As an initial matter, this Court should decline to entertain the government's argument and adhere to its customary practice of vacating and remanding for the courts below to apply the proper standard in the first instance—just as it did last Term when confronted by a similar argument from the government (in a case also involving the EEOC). *CRST*, 136 S. Ct. at 1653 (declining the government's request to affirm on an alternative ground after the EEOC abandoned "its defense

of the Court of Appeals' reasoning" because "[i]t is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance").[5]

Even if this Court were to accept the government's invitation to stand in the district court's shoes and make a relevance determination in the first instance—or even if the Court were to agree with court-appointed *amicus* that the Ninth Circuit applied the proper legal standard in reviewing the district court's decision *de novo*—reversal still would be required because the district court did not err, much less abuse its discretion, in performing the fact-sensitive relevance analysis required by *Shell Oil* to ensure the EEOC stays within the bounds of its investigative authority.

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[5] The government's request for affirmance is further complicated by the fact that the district court—having ordered the production of almost all of the information the EEOC requested, and having accepted McLane's argument that the remaining information sought was not relevant—did not address McLane's argument that producing the personal contact information would be an undue burden. The EEOC faults McLane (at 43-44) for not raising that argument as an alternative ground for affirmance in the Ninth Circuit, but as explained in McLane's merits brief (at 36-37), the Ninth Circuit could not have affirmed on that basis given the lack of a district-court finding. Moreover, McLane raised undue burden in its (granted) motion for the Ninth Circuit to take judicial notice of the district court's order regarding the ADEA subpoenas. See McLane C.A. Request for Judicial Notice at 1 ("[R]eview of the prior ADEA Order would be helpful to place the Order at issue in this appeal in context, including the specific finding of undue burden as to the production of termination reasons nationwide that Judge Snow made in the ADEA Order, and inherently adopted in the subsequent Order in this appeal.").

If ever there were a case where the EEOC is patently transgressing those boundaries to engage in an unauthorized fishing expedition—impermissibly "trolling for victims," as the district court put it—it is this one, where the agency is seeking the personal, confidential information of 14,000 individuals to investigate a charge alleging discrimination against one person—and where the agency's arguments why that information is relevant have constantly shifted. See *EEOC* v. *United Air Lines, Inc.*, 287 F.3d 643, 654 (7th Cir. 2002) (refusing to enforce EEOC subpoena seeking similarly extensive personnel information and noting that "[a]lthough the relevance requirement is not onerous, we believe that accepting the EEOC's interpretation of relevance in this case would render that requirement a 'nullity' ").

B. The District Court Correctly Held That The EEOC Failed To Carry Its Burden Of Establishing Relevance.

As McLane demonstrated in its merits brief (at 31-34), the district court carefully examined the facts and the charge and, after a hearing, determined that the EEOC failed to carry its burden of establishing relevance (and that the information sought went well beyond the scope of the charge). The district court did not err, much less abuse its discretion, in reaching that conclusion.

Unlike other agencies, the EEOC's "power to conduct an investigation can be exercised only after a specific charge has been filed in writing." *Shell Oil*, 466 U.S. at 64 (quoting 110 CONG. REC. 7214 (1964)). *Shell Oil* requires district courts to consider a subpoena in light of the specific facts and the charge, which is faithful to the EEOC's limited authority under 42 U.S.C. § 2000e. If the EEOC could subpoena anything that is theoretically useful to an investigation, there would be no limit to its investigatory authority. The agency must have a "realistic expectation"—not just an "idle hope"—that the information will shed light on the allegations in the charge. *Id.* at 63-65. Relevance is not a demanding standard—but it is not an open door, either, and it requires at least some showing of the EEOC's "realistic expectation" that it will obtain information relevant to the allegations in the charge.

Here, the EEOC seeks personal contact information, including Social Security numbers, for 14,000 individuals nationwide—on top of the voluminous material McLane has already produced. The agency's shifting rationales for why this information is relevant to its investigation—including several raised for the first time on appeal in the Ninth Circuit that were never made to the district court—underscore the lack of a legitimate justification. See McLane C.A. Br. at 24-31.

Initially, the EEOC said the information was relevant to investigate ADEA violations; then to investigate ADA violations; and finally to investigate Title VII violations—the last of which appeared nowhere in the

EEOC's district-court briefing and were raised for the first time at the hearing. See Br. of Pet. 8-11. In a footnote, the government now claims (at 37 n.10) that the EEOC "sought the pedigree information to investigate both Title VII and ADA claims." But it cites only the hearing transcript. *Ibid.* (citing JA 507-10). The EEOC's district-court briefing made clear that the pedigree information was sought for the ADA claim. See JA 467 (Heading: "EEOC Needs to Contact Test-Takers To Investigate Disability Discrimination."); JA 468 (arguing "EEOC needs to be able to contact all test-takers to determine if they are disabled under the ADA").

On appeal in the Ninth Circuit, the EEOC completely abandoned its ADA rationale for relevance and argued—for the first time—that its investigation of the charge could, "depending on the particular information uncovered," support the entire gamut of possible theories of discrimination from differential treatment to disparate impact—all on a nationwide basis. EEOC Br. 30. The EEOC thus advanced various theories that might apply if it uncovers facts somehow different from those alleged in the charge—but if that is enough to establish relevance, there is no limit to the EEOC's investigating authority, contrary to Congress's intent. See *Shell Oil*, 466 U.S. at 64.

The EEOC, under this record, cannot go on a fishing expedition "looking for victims" of any conceivable type of discrimination. The government may be right that the record in this case permits just one resolution—but if so, it is the resolution reached by the district court, not the Ninth Circuit.

C. The Government's Remaining Arguments For Affirmance Lack Merit.

While purporting to embrace the abuse-of-discretion standard of review, the government (at 38-43) commits the same error the Ninth Circuit did by treating relevance as an abstract question of law without reference to the language of the particular charge, without reference to the voluminous material already produced by McLane, and without reference to the EEOC's shifting arguments for the relevance of personal contact information for 14,000 individuals. While the district court did not expressly find that the EEOC acted with an improper motive in issuing the subpoena, any judge would—with good reason—be skeptical of a party that repeatedly shifted its rationales for seeking particular relief. Indeed, the trial court's greater familiarity with the parties' conduct of the litigation is one reason review should be for abuse of discretion.

1. The District Court Did Not Wrongly Apply The Law.

Repeating the Ninth Circuit's error, the government maintains (at 36) that the district court wrongly applied the law by equating "necessity" and "relevance," but as McLane has already explained in its merits brief (at 31-32, 34), the district court did no such thing and the government's contrary argument rests on a misreading of the district court's opinion. That is why the government has no answer for McLane's argument (at 34) "that the government should not be

able to subpoena information for which it has no need because the information will cast no additional light on the investigation." And in all events, "[a]n appellate court should not presume that a district court intended an incorrect legal result when the order is equally susceptible of a correct reading." *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 386 (2008).

The government's continued reliance (at 35-36) on this Court's inapposite decision in *University of Pennsylvania* v. *Equal Employment Opportunity Commission*, 493 U.S. 182 (1990), only underscores the weakness of the government's position. In that case, the university *conceded* that the information sought was relevant—the issue was whether "First Amendment principles of academic freedom required the recognition of a qualified privilege * * * that would require the Commission to demonstrate some particularized need, beyond a showing of relevance, to obtain peer review materials." *Id.* at 188. This Court's unsurprising unwillingness to recognize such a privilege has nothing to do with whether the district court reversibly erred for making the common-sense observation that it is difficult to see how information can possibly be relevant to a government investigation if the government cannot show a need for the information.

2. The EEOC Cannot Establish Relevance By Claiming It Needs Nationwide Contact Information For 14,000 People To Investigate "Possible" Disparate Treatment.

On appeal to the Ninth Circuit, the EEOC argued for the first time that it needs the contact information because it is also investigating "possible" disparate treatment on the basis of sex. See EEOC C.A. Br. at 33-34. But the charge does not allege that Ochoa or anyone else was treated differently. Indeed, noticeably absent from the charge is what the government claims (at 39) is a "pattern of treating female applicants or employees differently from male employees with respect to the use of strength tests." Cf. *UPS*, 587 F.3d at 138, 140 (holding that district court should have enforced subpoena seeking contact information for all job applicants denied employment because of, all employees who requested an exemption due to, and all employees terminated for reasons related to company's "appearance guidelines" where charge alleged that company had "a pattern or a practice of refusing to accommodate the religious observances, practices and beliefs of its employees").

Even if the charge could be read to allege that Ochoa was subject to disparate treatment, the EEOC's blanket request for the nationwide contact information of 14,000 people is vastly overbroad. This Court's cases in the class-action context are instructive. The Court has "held that one named plaintiff's experience of discrimination was insufficient to infer that

'discriminatory treatment is typical of [the employer's employment] practices.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 356 (2011) (alteration in original) (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 158 (1982)). Even if the charge alleged disparate treatment, then, the EEOC is still not entitled to nationwide contact information for 14,000 people.

The Ninth Circuit excused the EEOC's overbroad request because the charge did not rule *out* disparate treatment nationwide. Pet. App. 13. But that is not the test—by regulation, a charge must identify the complained-of conduct. See 29 C.F.R. § 1601.12(b) ("describe generally the action or practices complained of"). Again, the Ninth Circuit's logic erases any limits on the EEOC's investigative authority. The EEOC has not shown that a district court would necessarily abuse its discretion by enforcing these limits.

3. Personal Contact Information Is Irrelevant To Investigating Any Disparate Impact Of The Neutrally Applied Evaluation.

Disparate impact involves "practices that are fair in form" but discriminatory in effect. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). Cooperating with the EEOC's investigation notwithstanding its serious concerns about its scope, McLane voluntarily produced statistical information regarding every individual who had taken the Evaluation nationwide, including:

- a unique identification number;
- the location worked;

- the person's sex;
- the reasons for taking the Evaluation;
- the position sought;
- the physical capability achieved; and
- whether the physical capability met the minimum required for the particular position.

McLane also produced validation studies of the Evaluation—and even videotapes from observations of employees actually performing the positions by the third party hired by McLane to determine the strength capabilities needed to safely perform the duties of the positions. McLane further produced information as to whether any person who had taken the Evaluation suffered an adverse employment action within 90 days thereafter (whether or not the employment action had anything to do with the Evaluation). See generally Pet. App. 28.

As noted above, the EEOC's briefing in the district court focused solely on the "need[] to contact applicants and employees to identify individuals with disabilities" for purposes of investigating whether the Evaluation "violates the ADA." JA 21. At the hearing, however, the EEOC "agreed * * * that pregnancy is not typically a disability within the meaning of the ADA, and that Ochoa does not appear to have had the sort of atypical pregnancy that would trigger the ADA." Pet. App. 25. The district court also assured itself that "Ochoa does not appear to bring the ADA charge for

another aggrieved party." *Ibid.* The district court therefore refused to enforce the subpoena to the extent it would require McLane to produce the personal contact information based on the EEOC's own admissions that it was not claiming that Ochoa was, in fact, an aggrieved person under the ADA.

On appeal in the Ninth Circuit, however, the EEOC asserted for the first time that it needs to contact people for purposes of its disparate-impact investigation to understand their experiences in taking the Evaluation and whether it is similar to the duties of their position. Before this Court, the government speculates (at 42) that individual interviews might elicit testimony that the Evaluation was not truly given for a business purpose. But the EEOC already has the information to answer that question—McLane provided videotapes and documentation of the development and application of the tests so that the EEOC could evaluate them against the backdrop of videotaped job duties. McLane C.A. Br. at 31 n.14. A nationwide mismatch between the test and the job (*i.e.*, disparate impact) would be apparent from the tapes.

Even if conducting individual interviews could somehow be relevant to the EEOC's investigation, demanding the contact information (not to mention the Social Security numbers) for more than 14,000 individuals is grossly overbroad. And, again, the agency's constantly shifting rationales for why the information is relevant to its investigation—especially given the volume of materials already produced by McLane to the agency—provided the district court with a strong clue

that what the agency really wants—and what the district court properly refused to authorize—is the plenary investigative authority to "troll for victims" that Congress has expressly denied the agency. The district court did not err, much less abuse its discretion, in reaching that conclusion.

In sum, this Court could affirm only if the record admits of only one conclusion—that a district court would necessarily abuse its discretion by refusing to enforce the EEOC's subpoena. The EEOC has not carried this burden, and even if this Court concludes that the district court erred, the case should be remanded for the district court to exercise its discretion in the first instance.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

MCLANE COMPANY, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

No. 15-1248

MCLANE COMPANY, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

In *Pierce* v. *Underwood*, 487 U.S. 552 (1988), this Court described the proper framework for determining whether abuse-of-discretion review applies to a particular district court ruling. As the briefs of the government and petitioner demonstrate, that method calls for abuse-of-discretion review of administrative-subpoena enforcement decisions.

The amicus ignores the framework of *Pierce*. Instead, he offers an array of alternative approaches, suggesting that the Court should borrow the standard of review from *Ornelas* v. *United States*, 517 U.S. 690 (1996); derive a standard of review from the Administrative Procedure Act (APA), 5 U.S.C. 555; or adopt an analytical framework that diverges from *Pierce*. These approaches depart from this Court's teachings and would yield unsound results. This Court should apply *Pierce* and conclude, consistent with a long history of appellate practice, that administrative-

subpoena enforcement decisions are reviewed for abuse of discretion.

A. This Court's Cases Demonstrate That Abuse-Of-Discretion Review Is Appropriate

Nowhere mentioned in the amicus's brief is this Court's direction on the steps for determining whether a particular trial-court decision is subject to abuse-of-discretion or de novo review. *Pierce*, however, was clear about those steps, explaining that "[f]or some few trial court determinations, the question of what is the standard of appellate review is answered by relatively explicit statutory command"; that "[f]or most others, the answer is provided by a long history of appellate practice"; and that where "neither a clear statutory prescription nor a historical tradition" exists, a court should consider whether "as a matter of the sound administration of justice," a trial or appellate court is "better positioned * * * to decide the issue in question." 487 U.S. at 558-560 (citation and internal quotation marks omitted). Since then, this Court has repeatedly determined standards of review using the *Pierce* framework. *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748-1749 (2014); *Koon* v. *United States*, 518 U.S. 81, 97-100 (1996); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 403-405 (1990). That framework supports abuse-of-discretion review here.

1. a. As the government's opening brief explains (Br. 20-26), a long history of appellate practice supports abuse-of-discretion review of district courts' decisions regarding enforcement of administrative subpoenas. The amicus does not dispute that, with the exception of recent, unreasoned decisions of the Ninth Circuit, courts of appeals have uniformly concluded

that abuse-of-discretion review applies to decisions whether to enforce administrative subpoenas. That type of practice ordinarily deserves significant weight. *Pierce*, 487 U.S. at 558; see, *e.g.*, *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 135 S. Ct. 831, 838 (2015).

The amicus nevertheless argues (Br. 29-31) that this history should be disregarded because the courts of appeals reaching these decisions failed to recognize a de novo standard implicit in this Court's decisions on administrative subpoenas. The amicus is mistaken. None of the cases that the amicus invokes discussed standard of review, involved briefing on standard of review, or indicated that standard of review affected the disposition.

The amicus reads (Br. 13) the 1894 decision in *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, to establish that administrative-subpoena enforcement decisions should be reviewed de novo as pure questions of law. That contention is mistaken. The Court in *Brimson* did not consider standards of review, but instead addressed a litigant's claim that he had a right to a jury trial concerning his duty to comply with an administrative subpoena. *Id.* at 488. At the time of the decision, this Court had sometimes "spoken of the line" between jury and non-jury issues "as one between issues of fact and law." *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996). *Brimson* used that terminology to reject the litigant's jury-trial argument, concluding that the dispute concerning his duty to comply with a subpoena presented a question not "of fact, but of law exclusively," because the issue closely resembles matters that would be decided by judges rather than juries. 154 U.S. at 488 (discussing mandamus and contempt). That Sev-

enth Amendment holding has never been understood to control the level of appellate scrutiny for district court determinations underlying subpoena enforcement. Indeed, the Court has cautioned that "[t]he characterization of a mixed question of law and fact for one purpose does not govern its characterization for all purposes." *United States* v. *Gaudin*, 515 U.S. 506, 522 (1995).

Additional decisions involving enforcement of administrative subpoenas or orders that the amicus invokes (Br. 30-31) similarly did not address standards of review. *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943), *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186 (1946), and *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), each rejected legal arguments concerning the scope of agency authority under governing statutes or the Constitution—arguments that would be reviewed de novo even if a judge's ultimate subpoena-enforcement decision is reviewed for abuse of discretion. See *Koon*, 518 U.S. at 100.

In particular, *Endicott Johnson* held that an agency could enforce a subpoena to investigate compliance with the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 *et seq.*, without first establishing that an entity's activities are covered by that statute. While the amicus suggests (Br. 29-30) that *Endicott Johnson* must reflect an understanding that de novo review applies in administrative-subpoena enforcement cases because the Court did not remand the case for further proceedings after addressing the scope of the statute, the petitioner had raised only a single (legal) challenge. Affirmance was the appropriate course after the only asserted ground for reversal was rejected.

Moreover, even when an appellate court cannot simply affirm an underlying enforcement decision against the challenge presented, a decision to order enforcement rather than a remand does not necessarily reflect a reviewing court's application of a de novo standard. Courts engaged in abuse-of-discretion review commonly order that a subpoena be enforced after finding legal error in the district court's analysis, since no remand is necessary when only one resolution of the enforcement question would be within a court's discretion. See Gov't Br. 33; cf. *Endicott Johnson*, 317 U.S. at 510 (describing "[t]he subpoena power * * * as here exercised" as "so clearly within the limits of Congressional authority that it is not necessary to discuss the constitutional questions urged by the petitioner").

Oklahoma Press likewise rejected broad constitutional and statutory challenges to an administrative-subpoena scheme without ruling on standards of review. It rejected claims that the First Amendment, Fourth Amendment, or other statutory and constitutional limits barred the Secretary of Labor from subpoenaing a newspaper's records under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, either as a general matter or without showing probable cause. 327 U.S. at 192-218. The decision's lone reference to standards of review acknowledged, without criticism, that the court of appeals had ordered enforcement of a subpoena while applying abuse-of-discretion scrutiny—explaining that the court of appeals had "directed that the district court's discretion be exercised" in favor of enforcement. *Id.* at 191. And the Court made plain that it agreed that the validity of the subpoenas could not seriously be questioned. *Id.*

at 209 ("When these principles are applied to the facts of the present cases, it is impossible to conceive how a violation of petitioners' rights could have been involved."). That decision does not contravene the abuse-of-discretion approach.

Morton Salt is similar. It held that the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, permitted the Federal Trade Commission to require "special reports of corporations * * * of the manner in which [the companies] are complying with decrees enforcing" cease-and-desist orders. 338 U.S. at 651. The Court rejected arguments that requiring such reports violated the APA, Fourth Amendment, and Fifth Amendment. *Ibid.* The Court indicated that the orders before it were obviously within the bounds of the provision authorizing special reports. *Id.* at 649 (stating that the statute "would appear to grant ample power to order the reports here in question" and rejecting extratextual limitations); *id.* at 650 ("If the report asked here is not a special report, we would be hard put to define one."). The Court also noted that the respondents had not preserved any case-specific challenges to the reasonableness of the orders, *id.* at 653, and were instead challenging only whether the Commission had power to require special reports, *ibid.* ("Their position was that the Commission had no more authority to issue a reasonable order than an unreasonable one."). That decision does not contradict the approach taken by appellate courts to standards of review.

Finally, *McPhaul* v. *United States*, 364 U.S. 372 (1960), is even further afield. That case likewise did not involve discussion of (or briefing on) standards of review. But it also did not even involve a district

court's subpoena-enforcement decision. Instead, it involved a challenge to a criminal conviction for failure to obey a subpoena that had been *issued by Congress* and therefore was not subject to any district court subpoena-enforcement proceeding. These cases, which simply do not address standards of review, do not call into question the longstanding appellate tradition of deferential review for decisions on administrative-subpoena enforcement.

b. As the government's opening brief explains (Br. 23-26), the history with respect to administrative subpoenas is bolstered by equally uniform practice with regard to similar determinations, such as decisions regarding enforcement of pretrial subpoenas *duces tecum*, decisions regarding enforcement of grand jury subpoenas, and (as bearing on the relevance determination here) assessments of relevance under the Federal Rules of Evidence. The amicus does not dispute that history. And he offers no good reason why administrative subpoenas should be reviewed under a different standard than similar district court decisions, including decisions on grand jury subpoenas that are closely related to administrative subpoenas. *Oklahoma Press Publ'g Co.*, 327 U.S. at 216-217.

The amicus suggests that abuse-of-discretion review for grand jury subpoenas could be reconciled with de novo review for administrative subpoenas because the grand jury is best regarded as "an appendage of the Court." Amicus Br. 53 (quoting *United States* v. *Williams*, 504 U.S. 36, 66 (1992) (Stevens, J., dissenting)). But the opinion on which the amicus relies describes the grand jury as "an appendage of the court" only insofar as the grand jury requires a

court's aid to compel the testimony of witnesses—just as administrative agencies do. *Williams*, 504 U.S. at 66 (Stevens, J., dissenting) (describing the grand jury as an appendage because it is "powerless to perform its investigative function without the court's aid") (citation omitted). Beyond this, as the Court in *Williams* explained, grand juries are "functional[ly] independen[t]" of the judiciary. *Id.* at 48. Longstanding practice concerning grand jury subpoenas and similar compulsory process bolsters the appellate practice concerning administrative subpoenas.

c. As the government's opening brief notes (Br. 25-26), Congress ratified this longstanding practice in the context of Title VII, by incorporating subpoena-enforcement procedures of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, that had been uniformly construed to trigger abuse-of-discretion review.

The amicus argues (Br. 54) that ratification principles are inapplicable because the NLRA does not explicitly address appellate review, "and thus there is nothing that could be ratified by incorporation." That contention is inconsistent with *Lorillard* v. *Pons*, 434 U.S. 575 (1978), which held that a statute incorporated a jury-trial right when it incorporated the procedures set out in specified provisions of the FLSA. The Court explained that, although the FLSA did not mention a jury-trial right, "every court to consider the issue had * * * held" at the time of the incorporation that "there was a right to a jury trial in private actions pursuant to the FLSA." *Id.* at 580. Similarly here, courts had uniformly construed the NLRA subpoena-enforcement procedures to call for deferential appellate review, and Congress then incorporated the

NLRA's subpoena-enforcement procedures for Title VII subpoena enforcement. See 42 U.S.C. 2000e-9.

The amicus alternatively invokes the principle that "the *Lorillard* canon applies only 'when judicial interpretations have settled the meaning of an existing statutory provision.'" Amicus Br. 54 (citation omitted). That requirement is satisfied here, however, because every court to address the standard of review for NLRA subpoena-enforcement decisions had adopted an abuse-of-discretion standard. Indeed, the consensus is more robust than the consensus in *Lorillard*. Compare Gov't Br. 26 (noting uniform consensus among four courts of appeals) with *Lorillard*, 434 U.S. at 580 n.7 (relying on two cases from a single court of appeals and a district court decision).[1]

2. As the government's opening brief explains (Br. 26-33), abuse-of-discretion review is further supported by consideration of whether a trial or appellate court "is better positioned * * * to decide the issue in question." *Pierce*, 487 U.S. at 560 (citation omitted). The amicus offers no persuasive rejoinder.

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[1] Contrary to the amicus's assertion (Br. 54), *D.G. Bland Lumber Co.* v. *NLRB*, 177 F.2d 555 (5th Cir. 1949) and *NLRB* v. *Anchor Rome Mills, Inc.*, 197 F.2d 447 (5th Cir. 1952), do not suggest that the Fifth Circuit understood the APA to require de novo review of subpoena-enforcement decisions. Neither decision addressed—or had cause to address—standards of review. *D.G. Bland* simply remarked that the litigant's claims (which were contrary to decisions of this Court issued before the APA was enacted) gained no vitality after the APA's enactment, because the APA was "intended to leave the scope of judicial inquiry unchanged upon an application for the enforcement of a subpoena." 177 F.2d at 558. And *Anchor Rome* merely rejected a litigant's claim that the APA required the NLRB to promulgate regulations before enforcing a subpoena. 197 F.2d at 449-450.

a. Functional considerations support abuse-of-discretion review because administrative-subpoena enforcement turns on "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce*, 487 U.S. at 561-562; see Gov't Br. 27-29. The amicus does not meaningfully dispute that determinations of relevance, burden, motive, and specificity turn on such facts. Instead, he principally contends (Br. 43-45) that de novo review is appropriate because the case-specific determinations involved in subpoena enforcement rarely turn on observation of witnesses or credibility judgments, and instead generally turn on review of documents that can be placed before an appellate court.

This argument is flawed in two respects. First, district courts are better situated to decide questions that turn on multifarious and fleeting facts not only when credibility determinations and witness observation are involved, but also when district courts are simply more experienced in making the kind of determination at hand. This Court made that point in *Buford* v. *United States*, 532 U.S. 59 (2001), when it rejected the argument that determinations of whether past cases were appropriately treated as consolidated for sentencing should be reviewed de novo because the determinations typically turn on documentary records, so that "the underlying facts are not in dispute" and "witness credibility is not important." *Id.* at 64. This Court explained that "a district judge sees many more 'consolidations' than does an appellate judge," and that a district court's greater "[e]xperience with trials, sentencing, and consolidations" makes it better positioned to determine "whether a particular set of

individual circumstances demonstrates 'functional consolidation.'" *Ibid.*

That analysis is fully applicable here, because the questions resolved in administrative-subpoena enforcement are routinely resolved de novo by trial courts, but are assessed by appellate courts less frequently and only under an abuse-of-discretion standard. For instance, district courts routinely decide questions of relevance in the contexts of subpoena enforcement and trial rulings under the Federal Rules of Evidence, and they must consider whether compliance would pose an unreasonable or oppressive burden in addressing enforcement of a variety of subpoenas. See Fed. R. Crim. P. 17(c)(2); Sara Sun Beale et al., *Grand Jury Law and Practice* § 6:23 (2d ed. 2016). Courts of appeals see these questions far more rarely, and when they do see such questions, they consider only whether the trial court abused its discretion. Trial courts' substantially greater experience resolving de novo the fact-intensive questions that underlie subpoena-enforcement decisions favors deferential appellate review.

Deferential review of determinations that turn on "multifarious, fleeting, special, narrow facts that utterly resist generalization," *Pierce*, 487 U.S. at 561-562, also helps to prevent inefficient expenditures of agency and judicial resources. When appellate courts review decisions that are highly case-specific, that "investment of appellate energy" is unlikely to produce substantial "law-clarifying benefits" for future cases. *Id.* at 561; accord *Highmark*, 134 S. Ct. at 1749; *Buford*, 532 U.S. at 66. Applying a deferential standard of review to case-specific determinations discourages appeals that consume substantial resources

but produce only modest benefits. See Gov't Br. 27-28.

b. Abuse-of-discretion review is also counseled by the objectives of administrative-subpoena schemes generally and of Title VII in particular. The amicus does not dispute that subpoena-enforcement proceedings are designed to be quick, summary actions, ensuring swift enforcement and minimal consumption of resources on the part of litigants and courts. Frequent appeals undermine those objectives by consuming resources and slowing enforcement. See Gov't Br. 29-32.

The amicus responds (Br. 57) that litigants are no more likely to appeal under a de novo standard of review than under a deferential one. But a standard of review that increases the losing party's chance of success self-evidently increases its incentives to appeal, and this Court has recognized that a deferential standard of appellate review will "discourage litigants from pursuing marginal appeals." *Cooter & Gell*, 496 U.S. at 404. The amicus alternatively suggests (Br. 56) that, even if de novo review increases the frequency of appeals, it would not necessarily impede investigations because subpoena enforcement is not automatically stayed during appellate litigation. This argument also misses the mark. Increasing the number of appeals increases the number of stays because a litigant can generally delay enforcement only by filing an appeal. And because whether a stay is issued depends in part on likelihood of success on the merits, see, *e.g.*, *Hilton* v. *Braunskill*, 481 U.S. 770, 776-777 (1987), a de novo standard of review substantially improves a litigant's prospects of receiving a stay pending appeal, since an appellant's likelihood of success is greater

when the decision being challenged will be reviewed without deference.

The prospect that a de novo standard would generate additional satellite litigation also undermines Title VII and other investigative frameworks because such collateral litigation diverts resources from the agency's core investigative functions. The amicus seeks to minimize this concern (Br. 57) by asserting that the number of actions that the EEOC files to enforce subpoenas is small compared to the total number of discrimination charges that the EEOC receives. But subpoena-enforcement actions already represent a quarter of the suits filed by the agency. See EEOC, *Performance and Accountability Report, Fiscal Year 2016*, at 36, https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf. A change in the standard of review that generated additional subpoena-enforcement litigation would divert resources from investigating and resolving the tens of thousands of charges that the agency receives each year.

c. The amicus contends that the benefits of abuse-of-discretion review are outweighed by consideration of "unify[ing] precedent" and promoting "consisten[cy]" in guidance and enforcement. Amicus Br. 24 (citation omitted). But this Court's decisions reflect a recognition that searching appellate review of case-specific questions is likely to have only modest law-clarifying value. *Cooter & Gell*, 496 U.S. at 405 ("Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise.") (citation omitted); see *Pierce*, 487 U.S. at 559-563. Thus, when a determination is fact-intensive and other aspects of the statutory scheme favor discretion, this Court has not found that unifying precedent and pro-

moting consistency justify de novo review. See, *e.g.*, *Pierce*, 487 U.S. at 563; *Cooter & Gell*, 496 U.S. at 405; *Koon*, 518 U.S. at 99-100. Indeed, the interests in unifying precedent and giving guidance have never been understood to justify de novo review of case-specific determinations like those at issue here, such as decisions concerning grand jury subpoenas, pretrial subpoenas *duces tecum*, and discovery orders.

B. The Amicus's Contrary Arguments Lack Merit

Eschewing the *Pierce* framework, the amicus argues that the standard of review should be decided based on analogies to other legal inquiries. Each of his approaches lacks merit.

1. Decisions involving Fourth Amendment intrusions reinforce the Pierce analysis

The amicus argues (Br. 16-29) that de novo review should apply to administrative-subpoena enforcement decisions because some of the restraints on administrative subpoenas are derived from the Fourth Amendment, and (in the amicus's view) all trial-court determinations relevant to Fourth Amendment reasonableness should be reviewed de novo. The amicus's reliance on this Court's Fourth Amendment precedents is misplaced.

Consideration of the standard of review applied to trial-court rulings about alleged Fourth Amendment intrusions actually reinforces the longstanding approach of the courts of appeals to administrative-subpoena enforcement. To be sure, *Ornelas*, *supra*, held that de novo review applies to a trial-court determination about whether an officer's warrantless search or seizure was supported by probable cause or reasonable suspicion. See Amicus Br. 22-26. But the

standard of review that applies to rulings about mere constructive intrusions on Fourth Amendment interests, such as those involved in enforcement of subpoenas, has always been deferential. See *Oklahoma Press Publ'g Co.*, 327 U.S. at 202 (explaining that no "actual" search occurs when documents are obtained pursuant to "authorized judicial orders," but instead only a "'figurative' or 'constructive' search").[2] In particular, while grand jury subpoenas, pretrial subpoenas, and discovery orders involve intrusions upon Fourth Amendment interests comparable to the intrusion of an administrative subpoena, district court decisions ordering such intrusions are reviewed only for abuse of discretion. See Gov't Br. 29.

The question presented in *Ornelas*, moreover, concerned the standard of review that applies to a district court's after-the-fact determination that an officer's warrantless search or seizure was supported by reasonable suspicion or probable cause. By contrast, more deferential review applies to determinations by a magistrate in advance of a search—the type of determination more closely resembling those that are made when a district court enforces a subpoena. When a magistrate has found that probable cause exists, this Court has "repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review," and that

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[2] *Ornelas* also makes clear that de novo review is not categorically required for every trial-court ruling that implicates constitutional interests. The *Ornelas* Court identified the appropriate standard of review for the questions before it based on historical and functional considerations, rather than on any blanket constitutional rule. 517 U.S. at 697-700; see also *Miller* v. *Fenton*, 474 U.S. 104, 113-118 (1984).

the magistrate's determination of probable cause "should be paid great deference by reviewing courts." *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983); see *United States* v. *Ventresca*, 380 U.S. 102 (1965). Those decisions support deferential review of subpoena-enforcement decisions, which are made before enforcement of the subpoena occurs.[3]

Nor is there any conflict between the reasoning of *Ornelas* and the abuse-of-discretion approach. While both actual and constructive searches under the Fourth Amendment involve case-specific determinations, there are crucial differences with respect to other aspects of the functional inquiry. *Pierce* establishes that one important consideration is whether the "consequences" of a decision are so "substantial" that "one might expect [the decision] to be reviewed more intensively." 487 U.S. at 563. The stakes are different for actual and constructive searches, because constructive searches implicate more modest Fourth Amendment interests. *Oklahoma Press Publ'g Co.*, 327 U.S. at 213 (noting that the constitutional interests at stake in actual and constructive searches "are not identical * * * nor are the threatened abuses the same"); see *See* v. *City of Seattle*, 387 U.S. 541, 545

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[3] Decisions concerning probable cause also demonstrate that, contrary to the amicus's suggestion (Br. 41-42), there is nothing anomalous about requiring that a magistrate give weight to agency expertise in assessing whether the standards for issuance of a subpoena are satisfied, while also providing that magistrates' determinations are reviewed deferentially on appeal. See *Ornelas*, 517 U.S. at 698 (noting that courts should give "due weight to inferences by" a law enforcement officer who "views the facts through the lens of his police experience and expertise," while also noting that "'great deference' [is] paid when reviewing a decision to issue a warrant").

(1967) (explaining that the Fourth Amendment imposes only "rather minimal limitations" on administrative subpoenas). The lesser stakes support the deferential review that has uniformly applied to court orders compelling disclosure of information.

Moreover, the costs and benefits of de novo review differ significantly between subpoena-based intrusions and warrantless searches by officers. While de novo review of subpoena-enforcement decisions would encourage investigation-hindering delay, see *supra* pp. 12-13, that risk is not present when courts review the warrantless searches addressed in *Ornelas*, because such searches have already occurred. And while *Ornelas* gave substantial weight to the benefit of generating clearer guidance for officers performing warrantless searches in the field, 517 U.S. at 697-698, that interest is less substantial in the subpoena-enforcement context because enforcement occurs only after an opportunity for judicial review. In sum, intrusions on Fourth Amendment interests similar to those at issue here are uniformly reviewed deferentially—and with good reason.

2. *The Administrative Procedure Act does not render the* Pierce *framework inapplicable here*

The amicus also invokes (Br. 31-35) the APA provisions that address administrative subpoenas. But those provisions do not identify a standard of review. Section 555(c) of Title 5 simply makes clear that an agency may not issue a subpoena unless it is legally authorized to do so. ("Process, requirement of a report, inspection, or other investigative at or demand may not be issued, made, or enforced except as authorized by law."). And Section 555(d) gives a party in an administrative proceeding access to subpoenas on

the same terms as the agency, by stating that an "[a]gency subpoena[] authorized by law shall be issued to a party on request" and "sustain[ed] * * * to the extent that it is found to be in accordance with law." 5 U.S.C. 555(d); see U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 67 (1947) (*Attorney General's Manual*) ("The purpose of this provision is to make agency subpenas available to private parties to the same extent as to agency representatives."); see also 7 West's Fed. Admin. Prac. § 7784 (2d ed. 2016) (explaining that Section 555(d) "does no more than provide a private party with the same ability to gain information as that available to the agency").

The amicus does not contend that these provisions actually address the standard of review. He argues (Br. 32), however, that they effectively require de novo review because they indicate that a district court must enforce an administrative subpoena when certain substantive requirements are met. That argument is misguided.

The government agrees that, when the substantive requirements for an EEOC subpoena are satisfied, the district court must enforce the subpoena. See Gov't Br. 5 (citing *University of Pa.* v. *EEOC*, 493 U.S. 182, 192 (1990)). But many decisions that are governed by rules a district court must follow are reviewed on appeal only for abuse of discretion because of historical or functional considerations. These include rule-bound determinations on pretrial subpoena enforcement, grand jury subpoena enforcement, and relevance under the Federal Rules of Evidence. See Fed. R. Crim. P. 17 (rule governing subpoenas in the criminal context); *United States* v. *Nixon*, 418

U.S. 683, 699-700 (1974) (setting out test for enforcement of pretrial subpoenas *duces tecum*); *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 301 (1991) (setting out test for enforcement of grand jury subpoenas); Fed. R. Evid. 401 (setting out test for relevance under Federal Rules of Evidence). In other words, some decisions receive abuse-of-discretion review because of "primary" discretion, meaning there is "no formulary rule governing the situation or the issue," but other decisions receive abuse-of-discretion review because of "secondary" or "review-limiting discretion," under which appellate review is limited even though a rule of decision exists. Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 174-175 (1978); see 2 Stephen Alan Childress & Martha S. Davis, *Federal Standards of Review* § 7.06 (4th ed. 2010).

The *Attorney General's Manual*, which receives "some weight" in interpreting the APA, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979), confirms that the provisions the amicus invokes have no bearing on the standard of review. The manual explains that Section 555(d)'s reference to subpoenas "found to be in accordance with law" is simply "a reference to and an adoption of the existing law with respect to subpenas." *Attorney General's Manual* 68. It further explains that Section 555(d) "leaves unchanged existing law as to" both "the scope of judicial inquiry where enforcement of a subpena is sought" and "the reasonableness and the scope of subpenas." *Id.* at 69.

The APA thus does not alter or even address the standard of review for administrative-subpoena enforcement, and the amicus identifies no decision that treats the APA as setting that standard. The cases

that the amicus invokes (Br. 35) involve neither Section 555 nor subpoena enforcement more generally. Instead, they apply de novo review to a different type of decision under a different statutory provision—the decision to set aside an agency action as arbitrary, capricious, or contrary to law under 5 U.S.C. 706(2)(A). District courts' decisions on such matters do not involve the historical or functional considerations that favor abuse-of-discretion review of subpoena-enforcement decisions, and courts have not treated de novo review under Section 706(2)(A) as necessitating de novo review of subpoena-enforcement decisions.

3. The amicus's other proposed approaches are unworkable and contrary to precedent

The amicus proposes several alternative approaches for deciding the standard of review. Those approaches are incompatible with this Court's teachings and would produce unworkable results.

a. The amicus contends that the Court should apply de novo review because each of the questions in the subpoena-enforcement determination is inherently a "legal question" and must therefore be reviewed de novo. Amicus Br. 8; see *id.* at 36-40.

That approach is mistaken. The inquiries that a district court undertakes in deciding whether to enforce a subpoena—including the relevance inquiry at issue here—are mixed questions of law and fact. "[M]ixed questions of law and fact" are questions as to which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-*

Standard v. *Swint*, 456 U.S. 273, 289 n.19 (1982); see *Gaudin*, 515 U.S. at 512; accord *Ornelas*, 517 U.S. at 696. Determinations of whether particular information is relevant because it "might cast light on" the charge at hand, *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 69 (1984); whether a request is "too indefinite or has been made for an illegitimate purpose," *id.* at 72 n.26; and whether compliance "would be unduly burdensome," Pet. App. 8, each involve applications of law to fact.

In deciding the standard of review to be applied to issues that "fall[] somewhere between a pristine legal standard and a simple historical fact," this Court has analyzed whether "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985); accord *Pierce*, 487 U.S. at 559; see Harry T. Edwards et al., *Federal Standards of Review: Review of District Court Decisions and Agency Actions* 8 (2d ed. 2013). That approach reflects the Court's recognition that any other "methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller*, 474 U.S. at 113; see *Pullman-Standard*, 456 U.S. at 288 (noting "the vexing nature of the distinction between questions of fact and questions of law"). As explained above, functional considerations support abuse-of-discretion review here. See *supra* pp. 10-14.

The amicus appears to contend that mixed questions of law and fact that a court resolves during a subpoena-enforcement proceeding, such as the question whether materials are relevant to an investigation, are questions of law subject to de novo review

because they bear upon whether the EEOC is acting within its statutory authority. Amicus Br. 36 ("Determining whether the Commission has confined itself to the subpoena authority granted by Congress is a legal task, and the court of appeals properly reviews that question de novo."); *id.* at 40 (arguing that relevance is a legal determination because "[t]he congressionally established and judicially enforced boundaries placed on the EEOC's investigatory authority * * * are legal boundaries"). But whenever a court applies law to facts in order to decide whether an action was permitted, it determines whether the action fell within "legal boundaries." *Ibid.* Yet deferential review often applies to such decisions, as when a district court applies law to fact in making grand-jury subpoena enforcement decisions, trial-subpoena enforcement decisions, and determinations under the Federal Rules of Evidence.

b. The amicus alternatively contends (Br. 45) that, absent an express statutory command, abuse-of-discretion review is inappropriate unless "the district court's discretion is inherent." But a test that focuses on whether discretion is "inherent"—for which the amicus cites no precedent—would depart from this Court's decisions. For instance, in *Pierce*, while the Court observed in a footnote that it was "especially common" for matters of "supervision of litigation" to receive abuse-of-discretion treatment, 487 U.S. at 558 n.1, the Court explained that whether abuse-of-discretion review applied was to be determined based on text, history, and functional considerations, *id.* at 558-560; see *Cooter & Gell*, 496 U.S. at 399-405 (deciding standard of review for determinations underlying Rule 11 sanctions based on *Pierce* considerations,

rather than because sanctions involve "inherent" discretion).

Contrary to the amicus' suggestion (Br. 50), *Nixon*, *supra*, does not support an inherent-authority approach. *Nixon* did not mention an inherent-powers rationale in finding that decisions whether to enforce certain subpoenas under Federal Rule of Criminal Procedure 17(c) should be reviewed for abuse of discretion. Instead, the Court relied on the fact-intensive nature of the decisions—one of the considerations bearing on whether "one judicial actor is better positioned than another to decide the issue in question." *Pierce*, 487 U.S. at 560 (citation omitted); see *Cooter*, 496 U.S. at 403.

A test that turned on whether discretion was "inherent" (Br. 45) would also be unworkable. "[M]any decisions pertaining to a range of issues" are reviewed for abuse of discretion, including not simply decisions involving control over court proceedings but "also matters of a more substantive nature." Edwards 73 (offering as example determinations of whether state jury awards are consistent with state punitive damages statutes). As the amicus describes (Br. 48-49), these include determinations of "procedure, sanctions, remedy, sentencing, and fees and costs," as well as "matters of 'case management, discovery, and trial practice.'" These diverse decisions cannot be separated from others by characterizing them as "inherently" discretionary.

This case illustrates the unworkability of such a test, because the amicus offers little more than ipse dixit to explain why so many issues of procedure, remedies, and evidence are discretionary, but use of court processes to compel production of evidence under an

administrative subpoena—alone among uses of court process to compel production of evidence—is not. Rather, *Pierce* provides the appropriate framework to determine the standard of review. Under that approach, a district court's decision concerning whether to enforce an administrative subpoena should be reviewed for abuse of discretion.

* * * * *

For the reasons stated in respondent's opening brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Acting Solicitor General

FEBRUARY 2017

No. 15-1248

IN THE

Supreme Court of the United States

MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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November 2016

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IN THE

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No. 15-1248

MCLANE COMPANY, INC.,
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v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and National Federation of Business Small Business Legal Center respectfully submit this brief *amici curiae* in support of the petitioner.[1]

[1] The parties have consented to the filing of this brief. Counsel for *amici curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit,

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or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Many of *amici*'s members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. As representatives of potential defendants to Title VII discrimination charges and lawsuits, *amici*'s members have a substantial interest in the issue presented in this case concerning the proper standard of review that should be applied by appellate courts when reviewing a district court's determinations in an EEOC subpoena enforcement action.

Because they work closely with many professionals whose primary responsibility is compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. EEAC, the Chamber, and NFIB collectively

have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved important questions of Title VII's proper interpretation and application. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

Petitioner McLane Company (McLane) administers a physical capability test to all new hires, as well as to current employees returning from medical leaves of absence. Pet. App. 3. Damiana Ochoa was required to take the test before being allowed to return to work from maternity leave. *Id.* She took and failed the test three times, and therefore was not permitted to return to work. *Id.*

Ochoa subsequently filed an administrative charge with Respondent EEOC, alleging that use of the test discriminated against her on the basis of sex (pregnancy) in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended. Pet. App. 2.

As part of its investigation of the Ochoa charge, the EEOC asked McLane to provide extensive information about the test, including, for each person who took it:

- name, sex, date of birth, social security number, and contact information;
- disability status;
- the reason why he or she was required to take the test;

- test score; and
- reason for termination, if applicable.

Pet. App. 3-4, 20-21. The EEOC's request for information was not limited to the McLane facility where Ochoa worked, but rather extended to all McLane facilities nationwide. *Id.*

The EEOC also expanded the scope of its investigation to include requests for information that purportedly would help the EEOC decide if McLane violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, even though Ochoa was not over 40 when she took and failed the test. Pet. App. 5.

McLane challenged the breadth and scope of the information requests. The EEOC responded by issuing two subpoenas: one relating to potential ADEA claims (the "ADEA Subpoena") and one relating to the Ochoa sex discrimination charge (the "Ochoa Charge Subpoena"). Pet. App. 4-5. In response, McLane provided a database of all individuals who took the test nationwide by sex, location, position, test date, reason for the test, score, and (for applicants) whether the test taker was deemed minimally qualified for the position. Pet. App. 3-4. Dissatisfied, the EEOC filed an action in the U.S. District Court for the District of Arizona to enforce the ADEA Subpoena. Pet. App. 19.

After it received briefing and held a hearing on the EEOC's request to enforce the ADEA Subpoena, the district court granted the EEOC's request in part, holding that the agency was entitled to nationwide statistical data, but not to personal pedigree information, pertaining to the approximately 14,000 employees that took the test. Pet. App. 19. Undeterred, the EEOC then proceeded to file a second action in the district court to enforce the Ochoa Charge Subpoena,

seeking the same pedigree information, as well as additional disability-related information. *Id.*

In opposition to this second subpoena enforcement action, McLane argued that the EEOC was not entitled to any disability-related information, because Ochoa does not claim either to be disabled or that she was discriminated against because of actual or perceived disability. Pet. App. 23-26. It also contended that the additional pedigree information sought by the EEOC, including (among other data) name, date of birth, social security number, last known address, and phone number, was not relevant to whether or not use of the test discriminated against Ochoa because of her pregnancy. Pet. App. 20-21. Finally, McLane argued that the information pertaining to the "reason for termination" for all those who took the test was overly broad and unduly burdensome. *Id.*

The district court refused the EEOC access to the disability-related information on the ground that Ochoa could not state a claim for disability discrimination. Pet. App. 25-27. It also found that the additional pedigree information sought in this case – in particular, the names, contact information, and social security numbers of individual employees – was not relevant to resolution of the Ochoa charge:

> [A]n individual's name, or even an interview he or she could provide if contacted, simply could not "shed light on" whether the [test] represents a tool of gender discrimination in the aggregate. The EEOC has provided nothing to the Court to allay the concerns raised by McLane that such data has been requested as a means of trolling for possible complainants.

Pet. App. 29. The district court also declined to require McLane to produce the "reason for termination" information. Pet. App. 30-31.

The EEOC appealed the district court's order denying enforcement of its subpoena for pedigree and termination information, but only as to the sex discrimination claims. Pet. App. 1, 5. It abandoned the argument that the subpoena should be enforced because of its relevance to potential disability discrimination. Pet. App. 5-6.

On appeal, the Ninth Circuit reviewed the district court's ruling *de novo* even though it conceded that it did not know why it applied this standard instead of a deferential standard like the other federal courts of appeals. Pet. App. 8 n.3. It ultimately reversed the district court, enforcing the EEOC's subpoena for nationwide pedigree information. Pet. App. 15-16. It reasoned that the information was relevant because it would allow the EEOC to identify and contact other test takers who might have information casting light on Ochoa's allegations against McLane. Pet. App. 10-14. It also found that information concerning McLane's termination of other test takers was relevant, but remanded on the issue of whether requiring production of such information would be unduly burdensome. Pet. App. 14-16.

After its petition for rehearing *en banc* was denied, McLane filed a Petition for a Writ of Certiorari with this Court on April 4, 2016. The Court granted the petition as to the question of what appellate standard of review should apply to district court administrative subpoena enforcement determinations.

SUMMARY OF ARGUMENT

The Ninth Circuit erred when it applied a *de novo* standard of review to the district court's determinations of relevance and burden in an EEOC administrative subpoena enforcement action. These determinations by a district court are primarily factual, and therefore should be reviewed on appeal for clear error.

A deferential standard of review promotes effectiveness and efficiency because the district court is closest to the factual and evidentiary issues at play and can more readily appreciate the full weight of the evidence through hearings, witness testimony, and its direct access to the parties. This is especially true for fact-intensive matters such as EEOC subpoena enforcement actions. For that reason, every other court of appeals to have considered the issue applies a deferential standard of review to administrative subpoena enforcement orders.

A *de novo* standard of review delays prompt resolution by, among other things, encouraging appeals and discouraging informal resolution of non-merits issues. EEOC investigations are already lengthy, due in large measure to the EEOC's tendency to demand extensive, frequently irrelevant information seemingly in hopes of identifying potential systemic issues affecting a broader class of employees that go beyond the underlying charge allegations. These often abusive investigation tactics are the result, at least in part, of the EEOC's strategic aim to ensure that at least 20% of its active litigation docket is made up of class-based, systemic cases. To achieve that benchmark, the EEOC often demands, as part of investigation of even the most straightforward individual claim, voluminous information that has no relevance to the charge under investigation in an effort to "fish" for possible targets

for systemic enforcement. Applying a *de novo* standard to review of agency subpoena enforcement determinations would only serve to further extend an already lengthy EEOC investigation process, undermining Title VII's goals of prompt investigation and resolution of discrimination claims.

ARGUMENT

I. REVIEW OF EEOC SUBPOENA ENFORCEMENT DETERMINATIONS FOR ABUSE OF DISCRETION ACCORDS WITH TRADITIONAL LEGAL PRINCIPLES AND FURTHERS IMPORTANT POLICY AIMS UNDERLYING TITLE VII

A. Traditional Principles Of Appellate Review Provide That Mixed Questions Of Law And Fact Underlying EEOC Subpoena Enforcement Actions Should Be Reviewed Under A Deferential Standard Of Review

According deference to district court's factual determinations, such as those made when ruling on complex and often nuanced administrative subpoena enforcement actions, facilitates efficient resolution of disputes. For that reason, the Ninth Circuit's application of the *de novo* standard to the district court's subpoena enforcement was erroneous and the ruling should be reversed.

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Appeals courts may not set aside a district court's

"[f]indings of fact" unless they are "clearly erroneous." *See* Fed. R. Civ. P. 52(a)(6); *see also Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831 (2015). This Court has observed that Fed. R. Civ. P. 52 "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Teva Pharms.* at 836-37 (first quoting *Anderson v. Bessemer City*, 470 U.S. 564 (1985); then quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982)).

When reviewing mixed questions of law and fact, this Court likewise has held that "deferential review ... is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991) (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). Both factors typically are present when assessing questions of relevance and burden in connection with enforcement of an EEOC investigative subpoena.

Determining the relevance of documents requested during an EEOC investigation requires careful review of the underlying facts and whether the requested information stems from and is reasonably related to the underlying claim. *See, e.g., United States* v. *Nixon*, 418 U.S. 683, 702 (1974) ("Enforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues"). Furthermore, in conducting such an inquiry, a court often has to balance hardships and benefits that could result from its

determination. This weighing of burden-versus-need is necessarily a factual, discretion-based inquiry. *See EEOC v. Packard Elec. Div., Gen. Motors Corp.*, 569 F.2d 315, 318 (5th Cir. 1978) (determinations of burden in a subpoena enforcement action "imply a balancing of hardships and benefits, and the standard by which we review such matters of relative burdensomeness is 'abuse of discretion'"). For example, production of documents in response to any given document request may be unduly burdensome for one employer because of the nature of the request and the employer's recordkeeping systems but may create substantially less hardship for another. Therefore, a district court must exercise discretion in deciding when documents are relevant and, if so, at what point relevance is outweighed by the burden that would result if production is compelled.

1. A deferential standard of review promotes effectiveness and efficient resolution of collateral issues

Deference to district courts on determinations of relevance and burden that are central to an administrative subpoena enforcement action promotes both effectiveness and efficiency. First, a district court "[f]amiliar with the issues and litigants [is generally] better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990). An appellate court, on the other hand, evaluates questions of law based on a cold record that often fails to communicate critical insights that were conveyed to the district court judge. *Pierce*, 487 U.S. at 560; *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 433 (2d Cir. 1945) ("[I]n such cases the appeal must be decided upon an incomplete record, for

the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds") (L. Hand, Circuit Judge) (citation omitted). A deferential standard of review promotes efficiency as well because it "streamline[s] the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court." *Cooter & Gell*, 496 U.S. at 404. A *de novo* standard, on the other hand, delays prompt resolution by, among other things, encouraging second-bite appeals, even on issues that are ultimately collateral to the underlying claims being pursued by the EEOC. *Id.* (deferential review "discourage[s] litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation").

2. Deferential review is particularly appropriate for complex matters such as EEOC subpoena enforcement actions

Applying a deferential standard of review to mixed questions of law and fact is even more important when the question being decided is relatively complex and not susceptible to useful generalization. *Pierce*, 487 U.S. at 562. This Court has recognized that practical considerations favor deferential review when a question demands the application of a legal standard that requires a detailed understanding of complicated factual questions, such as in the EEOC subpoena enforcement context. *Teva Pharms.*, 135 S. Ct. at 838.

This case provides an excellent example of how EEOC subpoena enforcement actions often involve complex factual issues. Here, the EEOC initially sought nationwide information from McLane based on three different discrimination theories – sex,

disability, and age discrimination – even though the charging party only alleged sex discrimination in her charge. McLane initially provided only some of the requested information. In response, the EEOC issued two subpoenas – one purporting to seek information about a potential ADEA claim and one purporting to seek information about the charging party's sex discrimination allegations. Both subpoenas demanded data about more than 14,000 McLane employees, including pedigree information such as social security numbers. McLane responded to the subpoenas by again producing some information and objecting to other requests, which eventually resulted in it having to defend against two separate subpoena enforcement actions brought by the EEOC in federal court.

This level of factual and procedural complexity is common in EEOC subpoena enforcement actions. In *EEOC v. Wal-Mart Stores East, LP*, for instance, the EEOC issued a subpoena requesting employee information from 40 stores as part of the EEOC's investigation of allegations that the store's pre-employment physical abilities test had a disparate impact on women. Civ. No. 6:14-cv-228, 2016 WL 1242540, at *1 (E.D. Ky. Mar. 29, 2016), *appeal filed*, No. 16-2755 (6th Cir. June 2, 2016). In response, Wal-Mart produced data for three locations and declined to produce any personally identifiable data, arguing that compliance with the EEOC's overbroad demand would require sifting through data for more than one million applicants, at an estimated cost of $105,000 and 2,000 personnel hours. *Id.* at *1-*2. Adding to the complexity was the fact that the 2016 subpoena enforcement action was a continuation of a prior 2001 class action initiated by the EEOC that was resolved by consent decree in the same court. *Id.* at *1. The discrimination

charge underlying the 2016 action was based, in part, on allegations that the store's physical abilities test did not comply with the terms of the earlier consent decree. *Id.* Given the lengthy and convoluted history of that case, the district court was in a superior position as compared to the appeals court to analyze the multifaceted relevance and burden issues associated with enforcement of the EEOC's subpoena.

3. Every other court of appeals to have considered the issue applies a deferential standard of review to administrative subpoena enforcement actions

Accordingly, it is not surprising that every court of appeals that has addressed the issue, save for the court below, applies a deferential standard of review to administrative subpoena enforcement determinations. *See, e.g., FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 148 (D.C. Cir. 2015) ("We review a district court's decision to enforce an administrative subpoena for abuse of discretion") (citation omitted); *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 760 (11th Cir. 2014) ("We review the district court's balancing of the relative hardships and benefits of enforcement [in an administrative subpoena enforcement action] for abuse of discretion") (citation omitted); *EEOC v. Kronos Inc.*, 620 F.3d 287, 295 (3d Cir. 2010) (same); *Fresenius Med. Care v. United States*, 526 F.3d 372, 375 (8th Cir. 2008) (same); *NLRB v. Am. Med. Response, Inc.*, 438 F.3d 188, 193 (2d Cir. 2006) (In enforcing administrative subpoenas, the appellate court should affirm district court's finding of relevancy unless that determination is clearly erroneous) (citations omitted); *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 649, 654 n.6 (7th Cir. 2002)

(ruling on relevancy and burden associated with administrative subpoena should only be reversed for abuse of discretion); *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 647 (5th Cir. 1999) (same); *Reich v. Nat'l Eng. & Contracting Co.*, 13 F.3d 93, 98 (4th Cir. 1993) (appeals courts review a district court's administrative subpoena enforcement ruling under the clearly erroneous standard) (citation omitted).

The Ninth Circuit is alone in refusing to accord deference to a district court's administrative subpoena enforcement determination. Instead, it applies a *de novo* standard – even though it concedes that it does not have a good explanation for doing so. Pet. App. 8 n.3. To the extent the Ninth Circuit justifies its outlier approach by asserting that determinations of relevance and burden are pure questions of law, such an argument is untenable. As discussed above, a court's determinations of relevance, as well as its weighing of the burdens involved in producing the requested information, are primarily factual and discretionary in nature. For that reason, a district court's determinations of relevance and burden in administrative subpoena enforcement actions should be accorded deference on appeal. *See, e.g., Salve Regina College*, 499 U.S. at 233.

B. *De Novo* Review Of Subpoena Enforcement Determinations Undermines Prompt Investigation And Resolution Of Title VII Discrimination Claims

1. Title VII's relatively short limitations periods are intended to encourage prompt resolution of charges

A principal objective of Title VII is to promote prompt and efficient resolution of discrimination

claims. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) ("In pursuing the goal of 'bring[ing] employment discrimination to an end,' Congress chose '[c]ooperation and voluntary compliance' as its 'preferred means'") (citation omitted); *see also W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983) (voluntary compliance is an "important public policy" intended by Congress to be the "preferred means of enforcing Title VII") (citation omitted). To further that aim, Congress deliberately set a relatively short period within which charges alleging Title VII violations must be filed. 42 U.S.C. § 2000e-5(e) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred" or within three hundred days if "the person aggrieved has initially instituted proceedings with a State or local agency ...").

As this Court has observed:

> By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination ... [I]n a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days – rather than months or years – we may not simply interject an additional ... period into the procedural scheme. We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

Mohasco Corp. v. Silver, 447 U.S. 807, 825-26 (1980) (footnote omitted); *see also Int'l Union of Elec. Workers*

v. Robbins & Myers, Inc., 429 U.S. 229, 240 (1976) ("Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight'") (citation and footnote omitted).

There are also many practical reasons to encourage prompt investigations by the EEOC. Prompt resolution allows the affected employees to get relief faster and also can help to stop and correct a workplace problem before it becomes more serious or pervasive. In addition, the longer an investigation drags on, the more likely it is that evidence will be lost and memories will fade, which can impede an employer's ability to defend itself. As this Court pointed out in *Mohasco Corp. v. Silver*, the costs associated with processing and defending stale claims are significant and at a certain point "outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." 447 U.S. 807, 820 (1980).

2. *De novo* review would only extend already lengthy EEOC investigations

De novo review of a district court's administrative subpoena enforcement order can only serve to drag out already lengthy EEOC investigations, which in turn undermines prompt resolution of discrimination claims as contemplated in Title VII.

In Fiscal Year 2015, the EEOC spent on average ten months to complete a charge investigation. *See* EEOC,

What You Can Expect After You File A Charge.[2] Those delays have led, in turn, to a substantial charge backlog. For example, at the end of Fiscal Year 2016, the EEOC's pending inventory stood at more than 73,500 charges. EEOC, Performance and Accountability Report 55 (Fiscal Year 2016);[3] *see also* Press Release, Sen. Lamar Alexander, *Appropriations Committee Advances Bill Directing EEOC to Focus on "Massive" Backlog of 76,000 Unresolved Workplace Discrimination Cases* (Apr. 21, 2016) (noting that in Fiscal Year 2015, the EEOC went "far afield of [its] critical task, allowing its massive backlog of unresolved cases to climb to more than 76,000, while pursuing cases where there is no complaint ...").[4]

As discussed below, a major factor contributing to the excessive length of charge investigations has been the EEOC's recent efforts to expand as many individual claims as possible into potential candidates for systemic litigation. *See, e.g.*, EEOC Strategic Enforcement Plan 5 (Fiscal Years 2017-2021) ("The Commission reaffirms its commitment to a nationwide, strategic, and coordinated systemic program as one of EEOC's top priorities").[5] Those efforts have resulted in the EEOC regularly seeking to obtain voluminous and often overly broad company-wide information, which can take an employer hundreds or

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[2] *Available at* https://www.eeoc.gov/employees/process.cfm (last visited Nov. 18, 2016).

[3] *Available at* https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf (last visited Nov. 18, 2016).

[4] *Available at* http://www.alexander.senate.gov/public/index.cfm/pressreleases?ID=A8CDD86F-92C7-4FCC-87CE-202200174D5D (last visited Nov. 18, 2016).

[5] *Available at* https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf (last visited Nov. 18, 2016).

even thousands of hours to gather. This approach naturally leads to more pushback from employers and, in turn, greater EEOC subpoenas enforcement activity.

In Fiscal Year 2016, the EEOC filed 28 subpoena enforcement actions, compared to only 86 merits lawsuits – a ratio of approximately 3-to-1. EEOC, Performance and Accountability Report (Fiscal Year 2016), at 36. In comparison, the EEOC filed 383 merits lawsuits and only 32 subpoena enforcement actions in Fiscal Year 2005 – a ratio of approximately 12-to-1. EEOC, Performance and Accountability Report 11 (Fiscal Year 2005).[6] This notable decrease in merits litigation is further evidence that the EEOC is focusing more of its time and resources developing complex, systemic claims at the investigation stage.

Applying a *de novo*, rather than an abuse-of-discretion, standard of review only serves to lengthen this already drawn-out investigation process. When a *de novo* review standard applies, the party at the losing end of a determination is more likely to appeal, because it sees the appeal as a chance at a clean slate. *Cooter & Gell*, 496 U.S. at 404. That is particularly true of the EEOC, which does not directly bear costs of litigation in the same way as an employer.

Further extending the already lengthy investigation process by applying *de novo* review to rulings on investigation disputes does not comport with the prompt resolution goals of Title VII. *Mohasco Corp.*, 447 U.S. at 825-26. An abuse of discretion or clear error standard on the other hand would make an appeal on these sideshows less likely, allowing the

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[6] *Available at* https://www.eeoc.gov/eeoc/plan/archives/annual reports/par/2005/par2005.pdf (last visited Nov. 18, 2016).

parties to focus on the merits and resolve these discrimination disputes more efficiently, as Congress intended.

II. THE DISTRICT COURT IS BETTER POSITIONED TO ENFORCE THE IMPORTANT STATUTORY LIMITATIONS ON THE EEOC'S INVESTIGATION AUTHORITY AND TO DISCOURAGE ABUSIVE INVESTIGATION TACTICS

A. The Scope Of An EEOC Subpoena Is Limited By The Facts Of The Underlying Charge

The EEOC is authorized by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII sets forth "'an integrated, multistep enforcement procedure' that ... begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)); *see also Univ. of Pa. v. EEOC*, 493 U.S. 182, 190 (1990). Upon the filing of a charge, Title VII directs that the EEOC "shall make an investigation thereof." 42 U.S.C. § 2000e-5(b). The statute also provides:

> In connection with any investigation of a charge filed under section 706 [42 U.S.C. § 2000e-5], the Commission or its designated representative shall at all reasonable times have access to, for the

> purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter *and is relevant to the charge under investigation.*

42 U.S.C. § 2000e-8(a) (emphasis added).

Thus, in conducting discrimination charge investigations, the EEOC does not possess unfettered discretion to seek out other forms of discrimination not alleged by the charging party and outside the scope of its reasonable investigation of the charging party's claims. To the contrary, its authority to compel the production of evidence is limited to materials "relevant" to the allegations *in the charge*. 42 U.S.C. § 2000e-8(a). Thus, "unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled to access only to evidence '*relevant to the charge under investigation.*'" *Shell Oil Co.*, 466 U.S. at 64 (citation and footnote omitted) (emphasis added).

Thus, in vesting the EEOC with primary responsibility for enforcing Title VII, Congress unambiguously restricted the EEOC's subpoena power to inspecting and copying evidence relevant to the charge under investigation. *Id.* As this Court emphasized in *Shell Oil*, "Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity." 466 U.S. at 69.

A district court is best positioned to thoroughly evaluate whether documents requested in an EEOC administrative subpoena are relevant to the allegations of the charge being investigated. The district

court benefits from the history of the investigation dispute including any compromises or shifts in position by the parties, questioning of the parties and counsel at hearings, and proximity to often nuanced and complex issues that may arise in subpoena enforcement actions.

When the EEOC exceeds its statutory authority by issuing subpoenas for information pertaining to issues outside the bounds of the allegations being investigated, it unilaterally dispenses with Title VII's statutory requirements, as explained by this Court in *Shell Oil*, and robs employers of the basic protections they afford. *EEOC v. Bailey Co.*, 563 F.2d 439, 450 (6th Cir. 1977). For all of the reasons outlined above, the district court is better positioned to evaluate whether the EEOC's document requests are relevant to the allegations in the underlying charge and its determination of such should be accorded deference.

B. The Nuances And Peculiarities Of The EEOC's Often Overreaching Investigation Tactics Can Be Lost In Translation On Appeal

District courts, unlike appellate courts, have a continuing relationship with the subject matter of an action, which puts them in a superior position to judge the nuances and particularities of subpoena disputes, including overreaching or bad faith by one of the parties. *Pierce*, 487 U.S. at 560 (district court often gets insight not conveyed to the appellate court through the lifeless record). The EEOC's regular disregard for the statutory constraints on its investigative and enforcement authority is well-documented, causing harm to employers as well as employees. *See, e.g., EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 761 (11th Cir. 2014); *EEOC v. United Air Lines,*

Inc., 287 F.3d 643, 655 (7th Cir. 2002). Indeed, a Senate report identifies ten cases since 2011 in which the EEOC has been required to pay attorneys' fees as a result of frivolous or mismanaged litigation positions, many of which stemmed from investigation missteps. *See EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns About Important Anti-Discrimination Agency*, U.S. Sen. Comm. on Health, Educ., Labor and Pensions, Minority Staff Rep. 1-3 (Nov. 24, 2014) (hereinafter *Minority Staff Rep.*);[7] *see also* Mary Kissel, *Chronicling EEOC's Abuses*, Wall St. J. (Nov. 24, 2014).[8]

The *de novo* standard applied by the court below encourages the EEOC's current practice of crafting vague and indefinite information demands for the purpose of conducting unfettered "fishing expeditions" – in direct contravention of its statutory mandate. *See Shell Oil*, 466 U.S. at 90. The EEOC holds great leverage over the employers it investigates, which is no surprise, given the "vast disparity of resources between the government and private litigants." *EEOC v. Great Steaks, Inc.*, 667 F.3d 510, 519 (4th Cir. 2012). As noted, the agency routinely capitalizes on its position of advantage by serving overly broad requests for information that are unconnected to the particular allegations of the charge under investigation. *See, e.g., EEOC v. Southern Farm Bureau Cas. Ins. Co.*, 271 F.3d 209, 211-12 (5th Cir. 2001); *Kronos*, 620 F.3d at 300-02 (3d Cir. 2010); *Royal Caribbean Cruises*, 771

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[7] *Available at* http://www.help.senate.gov/imo/media/doc/FINAL%20EEOC%20Report%20with%20Appendix.pdf (last visited Nov. 18, 2016).

[8] *Available at* http://online.wsj.com/ articles/political-diarychronicling-eeoc-abuses-1416867954 (last visited Nov. 18, 2016).

F.3d at 761; *United Air Lines*, 287 F.3d at 655. An employer served with such a request often will find itself in an untenable position of either incurring substantial costs to produce the requested irrelevant information or incurring substantial costs to fight, just to risk losing and then being compelled to incur the costs to produce the documents anyway.

While the EEOC often targets large companies, employers with as few as 15 employees are subject to the laws the EEOC enforces, and thus also are potential targets of these abusive information requests. In one case, the EEOC was criticized for its "highly inappropriate" and "dogged pursuit" of a small business whereby it sought extremely broad categories of documents that were unrelated to any aggrieved person's charge of discrimination. *EEOC v. HomeNurse, Inc.*, 2013 WL 5779046, at *14 (N.D. Ga. Sept. 30, 2013). The district court refused to enforce the subpoena concluding that the agency's actions in that case "constitute[d] a misuse of its authority." *Id.* A number of courts have sanctioned the EEOC for similar prosecutorial abuses. *See, e.g., EEOC v. Freeman*, 778 F.3d 463, 472-73 (4th Cir. 2015); *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 616 (6th Cir. 2013); *EEOC v. TriCore Reference Labs.*, 493 F. App'x 955, 960-61 (10th Cir. 2012); *EEOC v. West Customer Mgmt. Group, LLC*, 2014 WL 4435980, at *1 (N.D. Fla. Sept. 8, 2014); *EEOC v. U.S. Steel Corp.*, 2013 WL 625315 (W.D. Pa. Feb. 20, 2013). The EEOC also has garnered considerable criticism from members of Congress, who have taken the agency to task for among other things "pursuing many questionsable cases through sometimes overly aggressive means."[9]

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[9] Minority Staff Rep. at 3.

As noted, the EEOC has put a high priority on pursuing systemic litigation where alleged discrimination has a potentially broad impact on an industry, profession, company or geographic area. The agency's systemic case quotas further encourage disregard of the statutory limits on its investigative authority by demanding overly broad company-wide information that has no connection to the charge under investigation. These self-imposed systemic case quotas have no statutory basis, and undermine effective enforcement of employment discrimination laws by diverting valuable resources away from investigations of ripe claims contained in a filed charge, and towards unbridled fishing expeditions in search of the "big" systemic case.

The negative impact of these overly aggressive and abusive investigation tactics is evidenced by the drastic downturn in merits lawsuits filed just one decade since the program began – a drop from 383 lawsuits in 2005 to just 86 in 2016. EEOC, Performance and Accountability Report 11 (Fiscal Year 2005); EEOC, Performance and Accountability Report 36 (Fiscal Year 2016). Rather than focusing its efforts on promptly investigating and seeking appropriate remedies for discrimination victims, the agency too often devotes inordinate time and resources on expensive investigations, often untethered from the underlying charge, in an effort to "fish" for possible subjects for systemic enforcement. *De novo* review of subpoena determinations only encourages such conduct.

CONCLUSION

For all of the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a court of appeals should review *de novo* a district court's order to quash or enforce a subpoena issued by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

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INTEREST OF AMICUS CURIAE

By order dated November 8, 2016, this Court appointed Stephen B. Kinnaird as *amicus curiae* counsel to defend the judgment of the court of appeals that a district court's decision to quash or enforce a subpoena issued by the Equal Employment Opportunity Commission ("EEOC" or "Commission") is subject to *de novo* review.[1]

RELEVANT STATUTORY PROVISIONS

In addition to the provisions reproduced by the parties, section 6 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 555, is relevant and reproduced in an addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

Title VII of the Civil Rights Act of 1964 declares certain forms of discrimination to be unlawful employment practices. 42 U.S.C. §§ 2000e-2, 2000e-3. Congress granted the EEOC the power "to prevent any person from engaging in any unlawful employment practice" described in the statute. *Id.* § 2000e-5(a).

"The Commission's enforcement responsibilities are triggered by the filing of a specific sworn charge of discrimination." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 190 (1990); 42 U.S.C. § 2000e-5(a), (e). Because the EEOC is tasked with "[p]rimary responsibility for

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and his firm made a monetary contribution to this brief's preparation or submission.

enforcing Title VII," *EEOC v. Shell Oil Co.*, 466 U.S. 54, 61–62 (1984), such a charge is a precondition to a private Title VII lawsuit. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 360–61 (1977). To be valid—to satisfy this administrative exhaustion requirement—the sworn charge must "identify the parties [to the alleged discriminatory acts] and ... describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

Once a valid charge has been filed with the EEOC, either by an aggrieved individual or by a member of the Commission, the EEOC is required to "make an investigation thereof." 42 U.S.C. § 2000e-5(b). If, after investigating, the EEOC concludes that there is no "reasonable cause" to credit the allegations in the charge, it closes its investigation and issues a "right-to-sue" letter to the charging party, authorizing that party to proceed to litigation. *Id.* § 2000e-5(b), (f)(1)(A); *Univ. of Pa.*, 493 U.S. at 191 & n.4. If, on the other hand, the EEOC finds reasonable cause to believe the allegations, it must engage in "informal methods of conference, conciliation, and persuasion" to resolve the matter. 42 U.S.C. § 2000e-5(b); *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). If those efforts fail, the Commission can itself file suit against the employer. *Id.*

The EEOC's authority to investigate a charge is broad but not unbounded. Congress set a purposefully calibrated legal limit on that authority; the Commission may seek only evidence that is both "relate[d] to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). The relevance

standard "afford[s] the Commission access to virtually any material that might cast light on the allegations against the employer." *Shell Oil*, 466 U.S. at 68–69. Nonetheless, the courts may not act "in a fashion that renders that requirement a nullity." *Id.* at 69.

The charge not only determines the scope of the EEOC's investigatory authority, but constrains the scope of any subsequent litigation. Because the EEOC's administrative process (investigation and conciliation) is a statutory precondition to litigation, *Mach Mining*, 135 S. Ct. at 1651, a "Title VII suit may extend as far as, but not beyond, the parameters of the underlying administrative charge." *Jorge v. Rumsfeld*, 404 F.3d 556, 565 (1st Cir. 2005); 2 Barbara T. Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 29-26–28 (5th ed. 2012).

In conducting an investigation, the EEOC issues "Requests for Information" and seeks voluntary compliance. *See* 1 *EEOC Compliance Manual* §§ 26.2, 26.3. "When evidence is available [but] the respondent [employer] has refused to produce it, [the EEOC can] obtain the evidence by issuance of a subpoena." *Id.* § 26.1(d). Title VII grants the EEOC the investigatory powers afforded the National Labor Relations Board ("NLRB"), including the power of subpoena, by section 11 of the National Labor Relations Act ("NLRA"). 42 U.S.C. § 2000e-9; 29 U.S.C. § 161.

A responding employer may petition the Commission to revoke or modify the subpoena, and the Commission may do so in its discretion "if in its

opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required." 29 U.S.C. § 161(1) (emphasis added); 1 *EEOC Compliance Manual* § 24.12(a)(1), (b). If the Commission rejects the employer's petition, and the employer still refuses to produce subpoenaed materials, the Commission may ask a district court to compel production. 29 U.S.C. § 161(2); *Univ. of Pa.*, 493 U.S. at 191.

B. Proceedings Below.

1. In 2008, Damiana Ochoa filed a Title VII charge with the EEOC. JA 41–43. The charge alleged that McLane Southwest, a subsidiary of Petitioner McLane Company, Inc. ("McLane"), engaged in sex discrimination based on pregnancy. JA 42–43. Ms. Ochoa's charge also asserted possible discrimination under the Americans with Disabilities Act of 1990 ("ADA"). JA 43.

The allegations of discrimination stemmed from McLane's use of the Industrial Physical Capacity Services Physical Capacity Exam ("PCE"), which Ms. Ochoa was required to take before returning to work from maternity leave. JA 42–43, 51–52. Ms. Ochoa claimed that McLane required such strength tests of "all employees returning to work from a medical leave and all new hires, regardless of job position." JA 43. After failing three attempts to pass the strength test following her pregnancy, Ms. Ochoa was ultimately fired. JA 42. Based on McLane's use of the PCE, the Commission itself filed a second charge

against McLane asserting possible violations of the Age Discrimination in Employment Act of 1967 ("ADEA"). Pet. App. 19.

In 2010, the EEOC sent the McLane subsidiary a letter notifying the company that the Commission was conducting an investigation of McLane based on both Ms. Ochoa's charge and the ADEA charge. JA 79–82. The EEOC asked for (among other items) pedigree information of McLane employees who took the PCE—*i.e.*, their names, dates of birth, social security numbers and contact information—along with the reason the person took the test, the person's score on the test, any relevant medical condition, and any adverse action that McLane took based on the person's performance on the test. JA 86–88.

After receiving an initial disclosure from McLane, the EEOC expanded its request to include information about applicants and employees at McLane's nationwide grocery division. *See* JA 80, 82; Pet. App. 4. McLane provided a database that identified employees and applicants who took the PCE by an employee number, and disclosed their gender and whether they passed the test. Pet. App. 3–4. The database did not disclose (among other things) pedigree information that would allow the EEOC to identify and contact test takers. *Id.*

McLane objected to the EEOC's demand for this information, arguing that the request was overbroad and not relevant to Ms. Ochoa's charge. JA 114–22, 340–47. Unable to resolve their dispute, the EEOC issued subpoenas seeking the requested information. JA 92–106, 169–82. The EEOC denied McLane's

petition to revoke the subpoenas on March 21, 2012. JA 183–97.

2. The EEOC then filed an action with the district court seeking enforcement of the subpoena based on Ms. Ochoa's charge. JA 1, 8–11.[2] Following briefing and a motion hearing, the district court denied enforcement of the subpoena in part. Pet. App. 18–33.

The district court determined that Ms. Ochoa's charge granted the EEOC jurisdiction to investigate her Title VII allegations, but not any claim under the ADA. Pet. App. 25–26. The district court therefore denied enforcement of the subpoena to the extent it required production of disability-related information. *Id.* at 26–27.

The district court rejected the EEOC's request for pedigree information that would identify individual employees because the information was not "relevant at this stage to a determination of whether the IPCS PCE systematically discriminates on the basis of gender." *Id.* at 28–29. "The addition of the gender variable" to McLane's testing data "will enable the E.E.O.C. to determine whether the IPCS PCE systematically discriminates on the basis of gender." *Id.* at 29. If statistical analysis indicates "that it does" discriminate, the district court wrote, "[a]t that point, pedigree information may become relevant to an investigation and the E.E.O.C. may find it necessary to seek such information." *Id.* at 30.

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[2] The district court had previously denied enforcement of the ADEA subpoena. Pet. App. 5.

Thus, the district court compelled McLane to produce nationwide information for employees and applicants of McLane's grocery division, including their sex, test date and score, position or reason test was taken, required score for that position, and any adverse employment action within 90 days of the test result. *Id.* at 31. The district court deemed the remaining requested information irrelevant to the EEOC's gender discrimination investigation. *Id.*

3. On appeal, the Ninth Circuit reviewed the district court decision *de novo*, and reversed in part and vacated in part the order. Pet. App. 15–16.

The Ninth Circuit held that the pedigree information was relevant to Ms. Ochoa's charge. Pet. App. 9–10. Under *Shell Oil*, the EEOC's desire to speak with individual "employees and applicants for employment who have taken the test to learn more about their experiences ... might cast light on the allegations against McLane—whether positively or negatively." *Id.* at 10. As one example, the Ninth Circuit noted that conversations with individual employees could allow the EEOC to determine whether "other female employees have been subjected to adverse employment actions after failing the test when similarly situated male employees have not." *Id.* The court determined that allowing the EEOC to access the information improves the Commission's ability to assess "whether use of the test has resulted in a 'pattern or practice' of disparate treatment." *Id.*

The Ninth Circuit rejected McLane's counter-arguments. Pet. App. 10–13. First, the court held that Ms. Ochoa need not have alleged explicitly a pattern-or-practice disparate treatment claim in

order for the EEOC to request pedigree information. *Id.* at 10–11. Second, the EEOC was not obliged to show that the pedigree information was "necessary" to its investigation. *Id.* at 11–12. Finally, the Ninth Circuit rejected McLane's argument that pedigree information was irrelevant to a neutrally applied strength test. *Id.* at 13. "The very purpose of the EEOC's investigation is to determine *whether* the test is being neutrally applied; the EEOC does not have to take McLane's word for it on that score." *Id.* The Ninth Circuit remanded the case for the district court to determine the unresolved question of whether producing the requested information would unduly burden McLane. *Id.* at 15–16.

SUMMARY OF ARGUMENT

An enforcement action in district court presents the question of a party's duty to comply with an administrative subpoena, which this Court has deemed a question of law. That inquiry typically consists of two parts: whether the investigation and request for documents is within the agency's statutory power, and whether the subpoena comports with the Fourth Amendment requirement of reasonableness.

When a court determines that an agency has (or has not) abided by statutory limits on its investigatory authority, and requested production of documents relevant to that investigation, it answers a legal question, and that answer is properly reviewed *de novo*.

So, too, is the determination whether the subpoena is reasonable under the Fourth

Amendment. By compelling self-disclosure, a subpoena is a constructive search within the Fourth Amendment guarantee. This Court has declared that the Fourth Amendment reasonableness standard requires that a subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The parties treat this as the governing standard, but fail to acknowledge its source in the Fourth Amendment.

This Court has long held that appellate courts review *de novo* the mixed question of law and fact of whether a Fourth Amendment search or seizure is reasonable because of the existence of reasonable suspicion or probable cause. The standard of review should be the same for the reasonableness of constructive searches by subpoena. Indeed, that latter question is much less fact-intensive than issues of reasonable suspicion or probable cause. The definiteness of the subpoena (like the particularity of a warrant) involves strictly the legal question of construction of the subpoena. While burden on the employer is a question of fact, whether that burden is unreasonable when measured against the public interest in investigating unlawful conduct is a conclusion of law that an appellate court is as well positioned as the district court to make. Even in more fact-intensive contexts, this Court has adopted *de novo* review of mixed questions of constitutional law and fact to unify precedent and ensure uniformity. Those same considerations apply here.

This Court has on multiple occasions conducted independent review of the enforceability of an administrative subpoena. It has never once

recognized discretion in the district court's application of legal standards or deferred to the district court's determination.

The APA, codifying the law that existed as of 1946, answers the question presented definitively. It provides that a district court "shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law." 5 U.S.C. § 555(d). That mandatory requirement forecloses district court discretion, and thus forbids abuse-of-discretion review of district court decisions. Appellate courts uniformly review *de novo* district court determinations whether agency action is "in accordance with law," since that question is, by definition, legal. The APA applies to the NLRA and Title VII (which incorporates the former), and requires *de novo* appellate review here.

Nothing in Title VII departs from the APA's approach. Title VII vests discretion in the EEOC; it confers no discretion upon the district court that could justify abuse-of-discretion review on appeal. Congress has simply defined legal limits on the EEOC's investigatory authority that the courts must enforce. Congress required that an EEOC subpoena (1) "relate[] to unlawful employment practices covered by" Title VII and (2) be "relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). To answer the first question, a district court must consider the elements of a valid charge and the range of conduct Title VII proscribes. It must then construe the text of the charge (without regard to extrinsic evidence) to ensure that it validly alleges conduct that Title VII outlaws. The second determination of relevance requires the district court to construe the

subpoena and the charge (both questions of law) and apply the legal standard of relevance (*i.e.*, whether the evidence "might cast light on the allegations against the employer," *Shell Oil Co.*, 466 U.S. at 68–69). It makes that determination based on the parties' theories as to the predicted value of the requested evidence to the EEOC's investigation. Determining relevance will rarely, if ever, require historical factfinding by the district court; the inquiry is legal in nature. Thus, the judicial task is to police the limits of the EEOC's investigatory power, informed by statutorily imposed standards. A district court's order marking out the boundaries of that power should be reviewed *de novo* in the court of appeals.

The parties advocate an abuse-of-discretion standard, but that standard is not only legally untenable for the reasons given, but unavailable in the absence of any statutory grant of discretion to the district court. The parties point to no case in which this Court has adopted an abuse-of-discretion standard to review determinations whether an agency has complied with statutory or constitutional limits or whether a party has a duty to comply with an agency order. This Court has embraced the abuse-of-discretion standard for review of certain subsidiary rulings that concern a district court's supervision of litigation, involve fact-intensive determinations where legal principles are secondary (especially ones that turn on witness credibility and demeanor), or invoke a district court's equitable or inherent powers. None of these circumstances exists here.

The parties rely on *United States v. Nixon*, 418 U.S. 683 (1974), but that is exactly such a case: it

involves a district court's issuance of its own pretrial criminal subpoenas, based on specific trial-related factual determinations, for the purpose of expediting criminal trials. Such subpoenas (which cannot be used for discovery) bear no resemblance to an investigatory EEOC subpoena, and the *Nixon* standards do not apply to administrative subpoenas issued by agencies of an independent branch of government pursuant to their independent statutory authority. Indeed, this Court has held that *Nixon* does not apply even to grand jury subpoenas, the validity of which turns on a legal standard of relevance to investigations that admits of no district court discretion.

The parties' remaining arguments lack force. Congress did not ratify the holdings of certain circuit decisions employing abuse-of-discretion review to NLRB subpoena enforcement orders when it incorporated section 11 of the NLRA into Title VII in 1972. *See* 42 U.S.C. § 2000e-9; 29 U.S.C. § 161. Section 11 does not address appellate review; there can be no ratification inconsistent with the APA; and there was no uniform judicial interpretation at the time. Nor will a *de novo* standard encourage marginal appeals that delay EEOC investigations. First, an appeal itself cannot delay an investigation (only a stay of the enforcement order can). Second, there is neither evidence nor logic behind this argument. The EEOC seldom brings subpoena enforcement actions, and few parties will forego a viable appeal if review is for abuse-of-discretion, especially since legal errors constitute *per se* abuses of discretion. *De novo* review not only prevents the injustice of inconsistent adjudications, but it also

promotes uniformity in the law on recurring issues, leading to fewer subpoena disputes and appeals as trial court decisions become more predictable and consistent with one another. The Ninth Circuit properly reviewed the district court's order *de novo*.

ARGUMENT

I. Appellate Courts Properly Review *De Novo* District Court Decisions To Enforce or Quash an Agency Subpoena.

A. This Court Has Long Recognized That Whether a Party Has a Duty To Comply with an Agency Subpoena Is a Legal Question.

From the dawn of the modern administrative state, Congress has empowered agencies and executive departments to issue subpoenas to access private information to perform their functions, and to seek enforcement in the district court.

In *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894), this Court considered a constitutional challenge to the provisions of the Interstate Commerce Act of 1887 authorizing judicial enforcement of the Interstate Commerce Commission's subpoenas. This Court rejected the claim that enforcement constituted an exercise of administrative and not judicial power, in violation of Article III. *Id.* at 469. The Court declared it "clear and indisputable" that the subpoenaed party had a "duty" (absent personal privilege) to obey the Commission's subpoena, "if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, [and] if such matter is one which

the commission is legally entitled to investigate." *Id.* at 476. The issues to be decided, under the grant of jurisdiction to enforce the administrative subpoena, were simply "[w]hether the commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States," and such matters were within the judicial power to decide. *Id.*

This Court noted that, in contesting this duty in court, the subpoenaed party would be free

> to contend before that court that he was protected by the constitution from making answer to the questions propounded to him, or that he was not *legally bound* to produce the books, papers, etc., ordered to be produced, or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the commission is entitled under the constitution or laws to investigate.

Id. at 479 (emphasis added). The Court rejected the claim that defendants were entitled to a jury trial on these legal questions: "the issue whether the defendants are under a duty to answer the questions propounded to them, and to produce the books, papers, documents, etc., called for, is manifestly not one for the determination of a jury. *The issue presented is not one of fact, but of law exclusively.*" *Id.* at 488 (emphasis added). "If there is any *legal reason*

why appellees should not be required to answer the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the court below when it enters upon the consideration of the merits of the questions presented by the petition." *Id.* at 489 (emphasis added).[3]

This Court confirmed the legal nature of the inquiry in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943). The Court held that the district court improperly denied enforcement of the Secretary of Labor's subpoena by deciding an issue (statutory coverage) that would be decided in subsequent agency adjudication. *Id.* at 507–09. This Court resolved the legal question of the enforceability of the subpoena

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[3] This Court has disclaimed the separate declaration in *Brimson*, 154 U.S. at 489, that there is no right of jury trial for criminal contempt of a court order. *See United States v. Gaudin*, 515 U.S. 506, 520 (1995). In *Gaudin*, this Court also overruled *Sinclair v. United States*, 279 U.S. 263 (1929), insofar as it held (relying upon *Brimson*) that a defendant had no right to a jury trial in a prosecution for criminal contempt of Congress to refuse to answer a "question pertinent to [a] question under [congressional] inquiry," Rev. Stat. § 102, 2 U.S.C. § 192. This Court disapproved *Sinclair*'s assumption that pertinence to a congressional inquiry was "a pure question of law," deeming it instead "a mixed question of law and fact." *Gaudin*, 515 U.S. at 520–21. As such, the Sixth Amendment required its submission to the jury. *Id.* at 521. In so ruling, this Court accepted *Sinclair*'s determination that relevancy "'is uniformly held [to be] a question of law'" for the court in civil trial matters, but observed that such a rule "says nothing about how relevancy should be treated when (like 'pertinence' or 'materiality') it is made an element of a criminal offense." *Id.* (quoting *Sinclair*, 279 U.S. at 298). Thus, *Brimson*'s holding that a party's duty to comply with an agency subpoena is a legal question in a civil enforcement proceeding remains in force.

itself: "The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the *duty of the District Court* to order its production for the Secretary's consideration." *Id.* at 509 (emphasis added).

This Court has elsewhere described the question of whether compulsory process in aid of administrative investigation exceeds the agency's power as a "jurisdictional question ... cognizable in the courts." *United States v. Bisceglia*, 420 U.S. 141, 151 (1975) (IRS summons) (internal quotation marks omitted). The duty of a party to comply with a subpoena, including the determination whether the requested documents relate to a matter within an agency's investigatory authority, is a legal question properly reviewed *de novo*.

B. Appellate Courts Review *De Novo* a District Court's Application of the Fourth Amendment Standard for Enforcing Agency Subpoenas.

As this Court held in *Brimson*, in addition to questions of statutory duty, a subpoenaed party may raise constitutional defenses in court. 154 U.S. at 479. A subpoena is deemed a constructive search that must meet the Fourth Amendment's reasonableness requirement. This Court has declared the following "constitutional requirements for administrative subpoenas":

> "It is now settled that, when an administrative agency subpoenas cor-

> porate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."

Donovan v. Lone Steer, Inc., 464 U.S. 408, 415 (1984) (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 651–53 (1950); *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186 (1946). Both parties accept this test as the governing standard, but do not address its constitutional derivation. Pet. Br. 18; Resp. Br. 4–5 & n.1. Like any other determination of the reasonableness of a search or seizure, the determination of whether an administrative subpoena violates the Fourth Amendment is a mixed question of law and fact that appellate courts properly review *de novo*.

1. A Subpoena Is a Constructive Search Under the Fourth Amendment.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, *papers, and effects*, against unreasonable searches and seizures." U.S. Const. amend. IV (emphasis added). A subpoena "is the equivalent of a search and seizure ... within the meaning of the 4th Amendment." *Hale v. Henkel*, 201 U.S. 43, 71 (1906) (grand jury subpoena); *Boyd v. United States*, 116 U.S. 616, 635 (1886). "[T]he right of personal security" guaranteed by the Constitution embraces "not merely protection of his person from assault, but exemption of his private affairs, books, and papers

from the inspection and scrutiny of others." *Brimson*, 154 U.S. at 479.

To be sure, a subpoena is not an actual search and seizure, but "a 'constructive' search." *City of Seattle*, 387 U.S. at 545; *Okla. Press*, 327 U.S. at 202, 207. A subpoena does not entail the intrusion of actual searches and seizures, and thus requirements imposed upon the latter—such as warrants or probable cause—do not apply. *Lone Steer*, 464 U.S. at 414–15; *Okla. Press*, 327 U.S. at 202–09. Nonetheless, the Fourth Amendment's protection "must necessarily attend all investigations conducted under the authority of congress." *Brimson*, 154 U.S. at 478; *see also Morton Salt*, 338 U.S. at 651–52 ("[T]he right to be let alone—the most comprehensive of rights and the right most valued by civilized men, is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process." (internal quotation marks and citations omitted)). "'The gist of the [Fourth Amendment] protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.'" *Id.* at 652–53 (quoting *Okla. Press*, 327 U.S. at 208).

2. The Fourth Amendment Requires Agency Subpoenas To Be "Reasonable."

The Court applied the Fourth Amendment restrictively in its early forays into the review of administrative subpoenas, construing agency authority narrowly. *See FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305–06 (1924); *Harriman v. Interstate Commerce Comm'n*, 211 U.S. 407, 420–22 (1911);

Jones v. SEC, 298 U.S. 1, 28 (1936); Kenneth Culp Davis, *The Administrative Power of Investigation*, 56 YALE L.J. 1111, 1114, 1119 (1947) (discussing early evolution of the doctrine).

In *Oklahoma Press*, a 1946 case involving Department of Labor subpoenas under the Fair Labor Standards Act, this Court clarified the proper constitutional inquiry. The Court noted that Congress has "a wide investigative power" over private corporations, "analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce." 327 U.S. at 204 (footnote omitted). The Court observed that a more liberal standard applied under the Fourth Amendment to subpoenas seeking compulsory production of corporate documents as opposed to an individual's private papers, *id.* at 205–06 & n.38 (citing *Wilson v. United States*, 221 U.S. 361 (1911), and *Essgee Co. of China v. United States*, 262 U.S. 151 (1923)); the former were valid so long as the subpoena did not "call[] for documents so broadly or indefinitely" as to resemble "a general warrant or writ of assistance, odious in both English and American history," *id.* at 207.

Distilling its prior precedents, this Court held that the Fourth Amendment "at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Id.* at 208. The Fourth Amendment requirement of probable cause, in this context, meant not probable cause to believe that a violation of law had occurred, but rather that "the

investigation is authorized by Congress, ... [and] is for a purpose Congress can order, and the documents sought are relevant to the inquiry." *Id.* at 209. Beyond this showing of statutory authority, the "requirement of reasonableness" includes "particularity," which in the subpoena context "comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry." *Id.*

For constructive searches of an administrative subpoena, the Fourth Amendment test reflects "the basic compromise ... to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed," *i.e.*, freedom from "officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law." *Id.* at 213. The Administrator "shall not act arbitrarily or in excess of his statutory authority," and if the subpoena is, in any respect, "unreasonable or overreaches the authority Congress has given," the subpoenaed party could raise the "appropriate defence" in district court. *Id.* at 216–17.

Four years later, this Court reaffirmed and summarized the Fourth Amendment standard in *Morton Salt*. In that case, salt producers challenged on Fourth Amendment grounds a Federal Trade Commission order requiring them to produce reports of compliance with a court decree enforcing a Commission order to cease and desist from certain unfair trade practices. 338 U.S. at 636-37. Noting that the Fourth Amendment applies "to the orderly taking under compulsion of process," this Court reiterated that corporations engaging in interstate

commerce as "artificial entities" "can claim no equality with individuals in the enjoyment of a right to privacy." *Id.* at 652. The Court acknowledged that "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry *as to exceed the investigatory power*," *id.* (internal citation omitted and emphasis added), but under the Fourth Amendment reasonableness test "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Id.* at 652–53 (citing *Okla. Press*, 327 U.S. at 208).

This Court has repeatedly characterized the *Morton Salt/Oklahoma Press* standard of reasonableness under the Fourth Amendment as "'settled'" law "describ[ing] the constitutional requirements for administrative subpoenas." *Lone Steer*, 464 U.S. at 414–15 (quoting *City of Seattle*, 387 U.S. at 544); *accord Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 67 (1974). Because the Fourth Amendment "must necessarily attend all investigations conducted under the authority of congress," *Brimson*, 154 U.S. at 478, the *Morton Salt/Oklahoma Press* standard applies to EEOC subpoenas. *See Shell Oil*, 466 U.S. at 72 n.26 (holding that, in addition to ensuring statutory compliance, "[t]he district court has responsibility ... more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose") (citing *Morton Salt*, 338 U.S. at 652–53, and *United States v. Powell*, 379 U.S. 48, 57–58 (1964)).

3. Appellate Courts Review Fourth Amendment "Reasonableness" Determinations *De Novo*.

In arguing for abuse-of-discretion or clear-error review, the parties and their *amici* treat the *Morton Salt/Oklahoma Press* standard as having materialized from thin air, and regard the choice of an appellate standard of review as a purely functional analysis without regard to the substantive source of law. But this Court's standard implements the Fourth Amendment's reasonableness requirement, and this Court has already held that the determinations of the reasonableness of searches and seizures under the Fourth Amendment are reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690 (1996). The same standard logically applies to the reasonableness of constructive searches by subpoena.

In *Ornelas*, this Court considered the proper standard of review of a district court's determination of two types of reasonable search and seizures under the Fourth Amendment: an investigatory stop supported by reasonable suspicion, *Terry v. Ohio*, 392 U.S. 1 (1968), and a warrantless search of a car based on probable cause, *California v. Acevedo*, 500 U.S. 565 (1991). 517 U.S. at 693. The Court described the district court's determination as a two-part inquiry comprised of (1) "the events which occurred leading up to the stop or search," and (2) "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Id.* at 696.

The Court held that the first inquiry involved "findings of historical fact," and should be reviewed "only for clear error." *Id.* at 699. The second inquiry, on the other hand, was a "mixed question of law and fact"—"whether the rule of law as applied to the established facts is or is not violated." *Id.* at 696–97. (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)).

The Court held that "the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed *de novo*." *Id.* at 691. The Court identified three factors supporting this conclusion.

First, it reasoned that *de novo* review safeguarded constitutional rights. "A policy of sweeping deference would permit, in the absence of any significant difference in the facts, the Fourth Amendment's incidence to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient" to constitute a reasonable search of seizure. *Id.* at 697 (internal quotation marks and brackets omitted). "Such varied results would be inconsistent with the idea of a unitary system of law." *Id.* The Court noted that it had *never* applied any other standard in this Fourth Amendment context. *Id.*

Second, it noted that "the legal rules for probable cause and reasonable suspicion acquire content only through application." *Id.*; *accord Miller v. Fenton*, 474 U.S. 104, 114 (1985). Independent appellate review is necessary "if appellate courts are to maintain control of, and to clarify, ... legal principles." *Ornelas*, 517 U.S. at 697.

Finally, the Court observed that "*de novo* review tends to unify precedent." *Id.* It reasoned that independent appellate review of Fourth Amendment reasonableness determinations would help establish clear rules to guide not only district courts but also officers conducting the search. *Id.* at 697–98. Following *Ornelas*, courts apply the *de novo* standard generally to determinations of the constitutional reasonableness of searches and seizures.[4]

Ornelas governs this case. It is the same law at issue: the Fourth Amendment's prohibition "against unreasonable searches and seizures," which protects one's "papers" and "effects" as well as one's "person." U.S. Const. amend. IV. No justification exists for applying a different standard to constructive versus actual searches. Indeed, *de novo* review is the norm for the application of constitutional standards to the facts of a given case. *See United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998) (noting that while a district court's factual findings "must be accepted unless clearly erroneous," a determination of a fine's excessiveness is reviewed *de novo* because it "calls for the application of a constitutional standard to the facts of a particular case").[5] Affording discretion to

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[4] *See, e.g.*, *United States v. Jennings*, 544 F.3d 815, 818 (7th Cir. 2008) ("[A] determination that a seizure was reasonable is reviewed *de novo*."); *United States v. Mallory*, 765 F.3d 373, 383 (3d Cir. 2014) (noting that circuits universally review determinations of exigent circumstances *de novo*); *United States v. Smith*, 389 F.3d 944, 950 (9th Cir. 2004) (reviewing permissibility of search incident to arrest *de novo*).

[5] *See, e.g.*, *Fenton*, 474 U.S. at 110 (voluntariness of confession under the Due Process Clause); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (independent review of actual malice required by First Amendment for defamation

district judges means that different results can be reached on the same facts, thus rendering a person's Fourth Amendment rights dependent on the luck of the draw of a trial judge. This Court has deemed the prospect of widely variant constitutional results "unacceptable." *Ornelas*, 517 U.S. at 697; *Cooper Indus.*, 532 U.S. at 440.

The considerations that prompted this Court to adopt a *de novo* standard in *Ornelas* apply *a fortiori* here. The determinations of reasonable suspicion and probable cause at issue in *Ornelas* are "fact-intensive" and typically require extensive evidentiary hearings; "[t]he factual details bearing upon those determinations are often numerous and (even when supported by uncontroverted police testimony) subject to credibility determinations." *Ornelas*, 517 U.S. at 701 (Scalia, J., dissenting). By contrast, in a subpoena enforcement proceeding, the subpoenaed evidence is not typically before the court, credibility determinations rarely come into play, and factfinding is minimal. This case is illustrative; here the district court resolved no disputed issues of fact that even

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liability); *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 431 (2001) (constitutionality of punitive damages awards); *Thompson v. Keohane*, 516 U.S. 99, 102 (1995) (determinations that a suspect is "in custody" and entitled under the Fifth Amendment to Miranda warnings); *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (constitutionality of pretrial identification procedures); *Brewer v. Williams*, 430 U.S. 387, 397 n.4 (1977) (waiver of Sixth Amendment right to assistance of counsel). Only a narrow set of constitutional issues involving mixed questions of law and fact where "resolution depends heavily on the trial court's appraisal of witness credibility and demeanor," such as a criminal defendant's competency or a juror's bias, are treated as essentially factual and reviewed deferentially. *Keohane*, 516 U.S. at 111 (discussing cases).

required an evidentiary hearing. The case was decided after a motion hearing, JA 494–526, on briefing supported by a handful of declarations that simply recounted the negotiations between McLane and the EEOC and the data produced to date, JA 34–40, 228–231, McLane's corporate structure, JA 446–47, and the nature and availability of the contested information and the burden of producing it, JA 233–35, 448–62.

Moreover, the *Morton Salt/Oklahoma Press* standard requires predominantly legal determinations. That standard permits subpoena enforcement "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant," *Morton Salt*, 336 U.S. at 652–53, and "compliance will not be unreasonably burdensome," *City of Seattle*, 387 U.S. at 544. The questions of statutory authority and relevance to an authorized investigation are legal, both generally and in Title VII. *See supra* at 13–16; *infra* at 36–42.

Moreover, the definiteness requirement parallels the particularity requirement of a warrant, so that the party knows what items he is obligated to produce. *Okla. Press*, 327 U.S. at 209. This inquiry requires evaluation of a specific document's language, *see* Resp. Br. 28–29, but that does not give district courts "an institutional advantage" over appellate courts, *Koon v. United States*, 518 U.S. 81, 98 (1996), in interpreting a document's meaning and legal sufficiency. A determination that a warrant is indefinite likewise requires a document-specific evaluation, and that determination is reviewed *de novo*. *See, e.g., United States v. Reeves*, 210 F.3d

1041, 1046 (9th Cir. 2000); *United States v. Campbell*, 764 F.3d 880, 887 (8th Cir. 2014).

Finally, whether a subpoena is "*unreasonably* burdensome" under the Fourth Amendment, *City of Seattle*, 387 U.S. at 544 (emphasis added), is a policy-based legal determination. To be sure, there may be subsidiary factual questions of burden to the employer, such as the cost of gathering documents or extracting them from computer systems, the financial strain on the employer, and the interference with the employer's operations. Pet. Br. 36. Although such facts are often uncontested, the district court's findings of such purely factual questions are reviewable for clear error. *See Ornelas*, 517 U.S. at 699. But a determination of unreasonable burden requires measuring the public interest in law enforcement against the private interest in security of property. *Okla. Press*, 327 U.S. at 209; *see id.* at 217 ("There is no harassment when the subpoena is issued and enforced according to law."). The Fourth Amendment's "flexible" standard of reasonableness "takes into account the public need for effective enforcement of the particular regulation involved." *City of Seattle*, 387 U.S. at 545. A court may consider whether the cost to (or other burden upon) the employer is disproportionate to any investigatory value to the agency of the requested documents, for an agency may only subpoena documents that are "adequate, but not excessive, for the purposes of the relevant inquiry." *Okla. Press*, 327 U.S. at 209. But this policy-based constitutional determination of excessiveness, which may restrict the power of a coordinate branch or independent agency, is a legal conclusion that is equally the province of appellate

courts. *See Cooper Indus.*, 532 U.S. at 436 (proportionality and excessiveness of punitive damages and fines reviewed *de novo*). *Cf. Am. Target Advert., Inc. v. Giani*, 199 F.3d 1249, 1254 (10th Cir. 2000) (reviewing question of "undue burden upon interstate commerce" *de novo*); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 195 F.3d 386, 388 (8th Cir. 1999) (reviewing question of undue burden on privacy rights of statute banning partial birth abortions *de novo*).[6]

Because legal questions predominate, factual disputes are distinctly secondary to the application of

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[6] In cases involving IRS summonses, this Court has adopted a standard similar to *Morton Salt* as a test of the IRS's "good faith," *United States v. Clarke*, 134 S. Ct. 2361, 2365 (2014), which includes inquiry into whether "the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Powell*, 379 U.S. at 58. Citing *Powell*, this Court has noted that the EEOC may not issue and enforce a subpoena for "an improper purpose." *Shell Oil*, 466 U.S. at 72 n.26. Whether the agency's purpose is improper appears to be part of the Fourth Amendment inquiry, *see Okla. Press*, 327 U.S. at 209, 213, but even if it arises independently from another source of law, this predominantly legal determination should be reviewed *de novo*. This Court held that "what counts as an illicit motive" is a "legal issue[]" not within the district court's discretion. *Clarke*, 134 S. Ct. at 2369. Thus, the ultimate conclusion that an agency pursued a subpoena for an improper purpose is a mixed question of law and fact (while a procedural ruling on the right to examine government agents is reviewed for abuse-of-discretion, *id.* at 2368). *De novo* review of such ultimate conclusions is necessary to unify precedent about what agency motives in investigation are illicit, given that "a presumption of regularity attaches to the actions of Government agencies," *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001).

law to fact, and witness credibility and demeanor will almost never be determinative, "the appellate court will be in as good a position ... as the district court was in the first instance" in resolving the constitutionality of subpoena demands, and thus the appellate court owes no deference. *Koon*, 518 U.S. at 98; *see also Cooper Indus.*, 532 U.S. at 440 (holding that *de novo* review was appropriate because the appellate court was equally capable, if not better suited, to decide two of the three criteria at issue). Moreover, even if some factual variation is inevitable, *de novo* review is necessary to unify precedent, giving consistent guidance to administrative agencies on the limits posed by the Fourth Amendment, and ensuring consistent enforcement of constitutional rights. *Ornelas*, 517 U.S. at 697–98. This Court should adhere to *de novo* review of all determinations of Fourth Amendment reasonableness.

C. This Court Has Always Determined *De Novo* a Party's Duty To Comply with an Agency Subpoena.

The history of appellate practice is relevant in determining the proper standard of review. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *Ornelas*, 517 U.S. at 697. This Court has always conducted independent review of the enforceability of administrative subpoenas. It has never once held that a party's duty to comply with such subpoenas is a matter of district court discretion or deferred to any such discretionary determination.

In *Endicott Johnson*, the district court had not reached the question of the relevance and reasonableness of the subpoena because it had

improperly determined that the respondent was outside the statute's coverage. 317 U.S. at 509. This Court did not remand the case, but instead independently resolved on the admitted facts that the subpoena must be enforced because it "was not plainly incompetent or irrelevant to any lawful purpose of the Secretary," and was "clearly within the limits of Congressional authority." *Id.* at 509-10. The Court would not have done so if subpoena enforcement were a matter of district court discretion; the proper course would have been to remand the matter to allow the district court to exercise its discretion in the first instance. *See Hills v. Gautreaux*, 425 U.S. 284, 306 (1975).

In *Oklahoma Press*, this Court reviewed conflicting district court decisions on whether to enforce subpoenas issued by the Wage and Hour Administrator investigating newspaper publishers. After rejecting the requirement of probable cause on which the decisions below turned, 327 U.S. at 215–16, this Court determined independently (and without regard to the view of either district court) that "[a]ll the records sought were relevant to the authorized inquiry," *id.* at 210, that the constitutional reasonableness standard was met, *id.* at 210–11, and that "[n]o sufficient reason was set forth in the returns or the accompanying affidavits for not enforcing the subpoenas," *id.* at 218. The Court did the same in *Morton Salt*. Applying the *Oklahoma Press* standard to a Federal Trade Commission order independently and without deference, the Court held that "[n]othing on the face of the Commission's order transgressed these bounds." *Morton Salt*, 338 U.S. at 652–53. In review of a contempt judgment, the Court

likewise independently applied the *Oklahoma Press* standard to a subpoena from the House Committee on Un-American Activities. The Court resolved that the requested records were "reasonably 'relevant to the inquiry,'" and that the subpoena "describe[d] them 'with all of the particularity the nature of the inquiry ... would permit,'" and was "not more sweeping than those sustained against challenges of undue breadth in *Endicott Johnson* ... and *Oklahoma Press*." *McPhaul v. United States*, 364 U.S. 372, 381–83 (1960). This unbroken record of independent determination by this Court of the enforceability of administrative subpoenas or similar compulsory process, and principles of *stare decisis*, *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), militate strongly in favor of a *de novo* standard of review.

D. The Administrative Procedure Act Limits Judicial Enforcement of a Subpoena to Determining Whether It Is "In Accordance with Law."

In keeping with the precedent above, Congress has declared in the APA that judicial enforcement of an administrative subpoena shall be limited to determining whether the subpoena is "in accordance with law." 5 U.S.C. § 555(d). Courts of appeals review this legal determination *de novo*. *See Tenet HealthSystems HealthCorp. v. Thompson*, 254 F.3d 238, 244 (D.C. Cir. 2001) (applying 5 U.S.C. § 706).

Subsection 6(c) of the APA provides that "[p]rocess, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law." 5 U.S.C. § 555(c). Subsection 6(d) grants parties a

right to "[a]gency subpenas authorized by law" on request and upon making any required showing of relevance and reasonableness of the request. *Id.* § 555(d). The statute then imposes a mandatory duty upon the courts to enforce any lawful subpoena:

> On contest, the court *shall sustain* the subpena or similar process or demand *to the extent that it is found to be in accordance with law*. In a proceeding for enforcement, the court *shall issue* an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

Id. (emphasis added).

The district court has no discretion in enforcing an administrative subpoena. It "shall sustain the subpena ... to the extent" it is lawful, quashing or modifying a subpoena otherwise. *Id.* If the subpoena is lawful, the court "shall issue" an enforcement order compelling production of the evidence or data sought. *Id.* In other words, the district court has "an affirmative duty under the APA ... to determine the extent to which the subpoena is in accordance with law and to enforce the subpoena to that extent." *United States v. Sec. State Bank & Trust*, 473 F.2d 638, 642 (5th Cir. 1973); Lee Modjeska, ADMINISTRATIVE LAW PRACTICE AND PROCEDURE § 2.4 (2016).

The legislative history confirms the APA's textual restriction of judicial enforcement to determinations

of a subpoena's lawfulness. Congress enacted the APA after this Court's opinions in *Brimson*, *Endicott Johnson*, and *Oklahoma Press*, all of which treat judicial enforcement as involving determinations of a subpoena's legal validity. The Senate Report describes subsection 6(d) as:

> constitut[ing] a statutory limitation upon the issuance or enforcement of subpenas *in excess of agency authority or jurisdiction*. This does not mean, however, that courts should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance, but should, instead, inquire generally into the legal and factual situation and *be satisfied that the agency could possibly find that it has jurisdiction*.

See Administrative Procedure Act: Legislative History 1944–46, S. Doc. No. 79-248 at 206 (1946) (hereinafter "APA Legislative History") (excerpting Sen. Rep. No. 79-752 (1945) (emphasis added)). The House Report contains the same language almost verbatim, and notes that "[i]n such contests, the court is required to determine all relevant questions of law." *Id.* at 265 (House Rep. No. 180).[7]

As Senator McCarran, the Chairman of the Senate Judiciary Committee and co-sponsor of the APA in the Senate, declared: "Where a party contests a

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[7] The House Report states that courts should be satisfied that the agency "could lawfully," as opposed to "could possibly," have jurisdiction. APA Legislative History, *supra*, at 265.

subpoena, the court is to inquire into the situation, and, so far as the subpoena is found in accordance with the law, the court is to issue an order requiring the production of the evidence under penalty." APA Legislative History, *supra*, at 319 (remarks of Sen. McCarran, Mar. 12, 1946). "All that this section requires is that the court determine whether the subpoena issued comes within the general power of the agency." *Id.* at 415 (Department of Justice memorandum on S.7, which as amended became the APA, *id.* at 1). "[I]n view of the existing law," Congress's deliberate use of the phrase 'in accordance with law'" was "intended to define with exactness the limits of inquiry in judicial enforcement proceedings." *Tobin v. Banks & Rumbaugh*, 201 F.2d 223, 224–26 (5th Cir. 1953).[8]

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[8] Indeed, the only debated question is whether the APA standard overruled this Court's decision in *Endicott Johnson* insofar as it barred inquiry into the agency's jurisdiction over the conduct of the subpoenaed party. *See Tobin*, 201 F.2d at 226; *see also* APA Legislative History, *supra*, at 363 (view of Rep. Walter, a House sponsor of the APA, that section 6(d) overruled *Endicott Johnson*); Davis, *supra*, at 1148–49 (discussing legislative history). Because Congress deliberately chose the phrase "in accordance with law" and rejected proposals explicitly expanding judicial inquiry into questions of agency jurisdiction, the Department of Justice and the Fifth Circuit have interpreted section 6(d) of the APA as merely codifying existing law. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 69 (1947) ("[T]he subsection leaves unchanged existing law as to the scope of judicial inquiry where enforcement of a subpena is sought.") (citing *Endicott Johnson* and *Okla. Press*)); *Tobin*, 201 F.2d at 224–26. But whether section 6(d) codified existing law or overruled *Endicott Johnson* to permit collateral review of the agency's jurisdiction over the party in a subpoena enforcement proceeding, judicial enforcement is still limited to determining

When a district court applies the APA's "in accordance with law" standard, appellate review is *de novo*. *See Tenet*, 254 F.3d at 243–44; *Preferred Risk Mut. Ins. v. United States*, 86 F.3d 789, 791–92 (8th Cir. 1996) (a district court's "finding that the actions of an agency were arbitrary, capricious, and not in accordance with law is reviewed *de novo*"); *accord Sierra Club v. Davies*, 955 F.2d 1188, 1192 (8th Cir. 1992); *Asarco, Inc. v. U.S. EPA*, 616 F.2d 1153, 1161 (9th Cir. 1980); *Biodiversity Conserv'n All. v. Jiron*, 762 F.3d 1036, 1059 (10th Cir. 2014).

In a typical subpoena enforcement action, the district court determines whether the subpoena is "in accordance with law" by determining whether the agency has complied with statutory requirements, and whether the subpoena satisfies the *Morton Salt/Oklahoma Press* Fourth Amendment standard of reasonableness. *See* 1 Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 4.2, at 286 (5th ed. 2010) ("A party who wants to resist enforcement of an agency subpoena has a realistic prospect of success only when it can raise a statutory or constitutional objection that is unique to the statute at issue or the nature of the materials requested."). Here, once the district court had determined that the EEOC's subpoena was not in accordance with law because it was not relevant to the charge under 42 U.S.C. § 2000e-8, the court of appeals was entitled to review that question *de novo*.

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whether the subpoena is in accordance with law, a legal question that an appellate court reviews *de novo*.

II. A District Court Decision Regarding the Scope of the EEOC's Statutory Authority to Issue a Subpoena Under Title VII Requires *De Novo* Review.

Nothing in Title VII imposes any standard of review different from the APA. The only unique aspect of Title VII is that Congress placed stricter legal limits upon the EEOC's authority than typically apply to parallel subpoena powers granted to other agencies. *Shell Oil*, 466 U.S. at 64 ("[T]he EEOC's investigative authority is tied to charges filed with the Commission ... unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction ... ."). Congress did so by requiring that the materials sought (1) "relate[] to unlawful employment practices covered by" Title VII and (2) be "relevant to the charge under investigation." 42 U.S.C. 2000e-8(a). Determining whether the Commission has confined itself to the subpoena authority granted by Congress is a legal task, and the court of appeals properly reviews that question *de novo*.

A. The Statutory Restrictions in Title VII Raise Questions of Law, Which Must Be Reviewed *De Novo*.

1. Whether Evidence "Relates to Unlawful Employment Practices" Is a Legal Question.

To determine whether the information subpoenaed by the EEOC "relates" to conduct made unlawful by Title VII, the district court must first determine that the EEOC had jurisdiction to investigate because a valid charge of unlawful

employment practices had been filed. To answer that legal question, the court must consider the elements of a valid charge and the range of conduct Title VII proscribes. The district court must then construe the text of the charge to ensure that it alleges conduct made unlawful by Title VII. The district court is entitled to no deference in deciding either what Title VII covers or what the text of the charge says; these tasks yield answers to a question of law.

"[T]he existence of a charge that meets the requirements set forth in § 706(b), 42 U.S.C. § 2000e-5(b), is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC." *Shell Oil*, 466 U.S. at 65. Section 706(b) requires that the charge "be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). EEOC regulations provide that a valid charge must sufficiently describe unlawful employment practices by providing "[a] clear and concise statement of the facts, including pertinent dates," identifying "the parties," and describing "generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

Determining whether there is a valid Title VII charge is quintessentially a legal task, and a district court's determination on such a question is unarguably reviewed *de novo*. The validity of a charge is "determined from the face of the charge, not from extrinsic evidence." *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 650 (7th Cir. 2002); *see also EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1065 (6th Cir. 1982). A charge will be deemed valid unless, on its face, it alleges no unlawful employment practice within the

scope of Title VII as a matter of law. *See, e.g., U.S. EEOC v. Maritime Autowash, Inc.*, 820 F.3d 662, 665 (4th Cir. 2016) (holding that because the EEOC charge at issue sufficiently alleged national origin discrimination on its face, its validity could not be defeated by employer's potential defenses); *cf. EEOC v. Cherokee Nation*, 871 F.2d 937, 938–39 (10th Cir. 1989) (reversing district court's enforcement of subpoena because the age discrimination charge did not state an ADEA claim against employer as a matter of law). The "interpretation of an EEOC charge presents a question of law that [appellate courts] review *de novo*, not a question of fact." *EEOC v. Konica Minolta Bus. Solutions U.S.A., Inc.*, 639 F.3d 366, 371 (7th Cir. 2011).[9]

The EEOC may only investigate unlawful employment practices proscribed in Title VII. 42 U.S.C. § 2000e-5(a). If the charge fails to describe any employment practice made unlawful by Title VII, the EEOC lacks authority to investigate, and the district court must refuse to enforce any subpoena issued in the matter. *See EEOC v. Michael Constr. Co.*, 706 F.2d 244, 248 (8th Cir. 1983) ("If the court finds that the charge ... is not sufficient under Title VII or EEOC regulations, it may deny judicial enforcement of the EEOC subpoena issued pursuant to that charge ... ."). If, however, the charge describes an unlawful employment practice, the EEOC has authority, and indeed, a statutory obligation, to investigate, and it may subpoena

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[9] *Accord Pacheco v. Mineta*, 448 F.3d 783, 788–89 (5th Cir. 2006); *Nichols v. Am. National Ins.*, 154 F.3d 875, 886 (8th Cir. 1998).

information relevant to the charged unlawful practices. *See Shell Oil*, 466 U.S. at 64.

In other words, answering the first statutory question—whether the charge is "valid" and alleges conduct unlawful under Title VII—requires the district court to do two things: (a) find the law of charge validity, and the conduct Title VII proscribes; and (b) construe the charge itself to determine whether it passes muster. Both inquiries are legal, and a district court's resolution of those questions is reviewed *de novo*.

2. Relevance of the Information to the Charge Presents a Legal Question.

Once the district court has determined, as a matter of law, that the charge is "valid," and alleges conduct made unlawful by Title VII, it still may only enforce the subpoena if the subpoenaed information would be "relevant to the charge," 42 U.S.C. § 2000e-8(a). That is a legal determination, too. *See Brimson*, 154 U.S. at 488 ("The issue presented is not one of fact, but of law exclusively."); *Florez v. CIA*, 829 F.3d 178, 184 (2d Cir. 2016) ("Relevance is a legal determination.") (internal quotation marks omitted); *Konica*, 639 F.3d at 368 (examining relevance in a subpoena enforcement context: "[A]s usual, we consider questions of law *de novo*. As both parties conceded at oral argument, this case presents a straightforward question of law." (internal citation omitted)); *NLRB v. Rogers Mfg. Co.*, 406 F.2d 1106, 1110 (6th Cir. 1969) ("Axiomatically, the determination of relevancy is a matter of law and not of fact.").

As the EEOC says, "relevance" is "'generously construed.'" Resp. Br. 5 (quoting *Shell Oil*, 466 U.S. at 68). The statute allows the EEOC to seek any evidence "that might cast light on the allegations against the employer." *Shell Oil*, 466 U.S. at 68–69.

It is fitting that the judicial standard established for marking out the boundaries of the Commission's investigatory authority provides that flexibility. Whether evidence would cast light on the allegations in a valid charge involves predictive judgment and experience, and Congress vested the responsibility to answer that question in the first instance in the EEOC, as it has expertise in such matters. *See* 42 U.S.C. § 2000e-9; 29 U.S.C. § 161(1); *see also EEOC v. Randstad*, 685 F.3d 433, 448 (4th Cir. 2012) ("Congress has delegated to the EEOC the authority to investigate charges of discrimination, and naturally the agency has developed expertise in that area. In this and other areas, where an agency is tasked with investigation, we 'defer to an agency's own appraisal of what is relevant so long as it is not obviously wrong.'" (internal citation omitted)).

But, as with relevance determinations generally, "the determination of whether the information sought bears a sufficient relationship to the investigative purposes to permit enforcement of the subpoena is predominantly a matter of law." *EEOC v. United Parcel Serv., Inc.*, 587 F.3d 136, 142 (2d Cir. 2009) ("*UPS*") (Newman, J., concurring). The congressionally established and judicially enforced boundaries placed on the EEOC's investigatory authority, as relaxed as they may be, are legal boundaries nonetheless. These legal limits, found in the text of Title VII, reflect "Congress' desire to

prevent the Commission from exercising unconstrained investigative authority," *Shell Oil*, 466 U.S. at 65, and it is the courts' responsibility to enforce those limits as a matter of law. Courts may not leave the fox to guard the henhouse, and the best way to avoid this "fox-in-the-henhouse syndrome" is "by taking seriously, and applying rigorously, in all cases, statutory limits on [the] agencies' authority." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).[10] Doing so requires the courts to answer legal, not factual, questions.

The critical point is that any "discretion" in deciding what is relevant to the subpoena *belongs to the EEOC*, not to the district court. The EEOC adverts to the rule that a district court's admission or exclusion of evidence under the relevance standard of Federal Rule of Evidence 401 is reviewed for abuse of discretion, *see* Resp. Br. 23 & 28, but that is precisely because the admissibility of evidence in proceedings it supervises is committed to the district court's discretion. *See infra* at 48-49. The district court enjoys no such discretion with regard to EEOC subpoenas. No matter how much latitude the EEOC possesses under *Shell Oil*, a district court order that purports to approve or delimit EEOC's investigatory authority is entitled to no deference from the court of appeals. It is a legal determination. The EEOC,

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[10] Unlike in *Arlington*, this case presents no question of deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). The EEOC has not determined the reach of the statutory phrases "related" or "relevant," and possesses no statutory authority to do so in any event; Congress has only delegated the EEOC the authority to promulgate "procedural regulations to carry out the provisions of this [subchapter]" in conformity with the APA. 42 U.S.C. § 2000e-12(a).

given its record of prevailing in district courts, may prefer deferential review, but enforcement determinations are properly subject to *de novo* review.

B. The District Court Is Not Entitled to Deference Because Factual Questions Do Not Predominate in Enforcement Decisions.

The parties and their *amici* rely heavily on the variable subject matter of subpoenas as a rationale for abuse-of-discretion (or clear-error) review in the court of appeals. But simply because relevance may be "variable in relation to the nature, purposes and scope of the inquiry," *Okla. Press*, 327 U.S. at 209, does not mean that factual questions predominate, or that the district court is better positioned than the court of appeals to determine relevance.

To the contrary, the district court conducts an extremely limited factual review *precisely because* the Commission's own determinations regarding the relevance of the requested evidence in issuing the subpoena are given substantial weight. The district court, in deciding whether to enforce an EEOC subpoena, does not independently make discretionary predictive judgments about whether the evidence will cast light on the allegations against the employer, but merely decides whether the Commission has "act[ed] arbitrarily or in excess of [its] statutory authority." *Id.* at 216; *see Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997) ("[T]he district court should not reject the agency's position [on relevance] unless it is obviously wrong." (quotation marks omitted)). Thus, when "a district court fails to accord appropriate scope to an

agency's legitimate demands for information, an appellate court is entitled to rule that the district court has committed an error of law." *UPS*, 587 F.3d at 143 (Newman, J., concurring).

The district court is rarely called upon to make determinations of historical fact in deciding relevance, much less resolve factual disputes; the dispute is merely about the relationship that the *type* of evidence requested (here, pedigree information) bears to the charge being investigated. Thus, the district court's review is "sharply limited," and "summary in nature." *Randstad*, 685 F.3d at 442; *Konica*, 639 F.3d at 368. In the great run of cases, the district court simply has to determine the scope of the charge (which defines the agency's authority—a legal question determined form the face of the charge itself), and the scope and nature of the documents requested (determined from the face of the subpoena). *See, e.g.*, *Konica*, 639 F.3d at 368 (citing *EEOC v. Tempel Steel Co.*, 814 F.2d 482, 485 (7th Cir. 1987)). The district court then hears argument about the predicted value of the evidence to the EEOC's investigation of the charge, as it did here, JA 20–22, 211–15, and applies the *Shell Oil* standard of whether the evidence will cast light on the allegations. *Accord* Petr. Br. 16 (district court "consider[ed] the language of the charge against the EEOC's evolving theories of relevance"). Resolving these issues does not require historical factfinding by the district court.

The EEOC's assertion that the district court is better suited than the court of appeals to make these determinations is mistaken. Unlike a typical civil action on the court's docket, which the district judge

observes and manages from complaint through trial, a subpoena enforcement action comes to the district court as a discrete proceeding presenting the singular issue of the respondent's duty to comply with the agency's subpoena. "The documents involved are usually unknown except to the respondents, and the district court is frequently not familiar with the issues or the specific evidentiary necessities of the case." John B. Benton, *Administrative Subpoena Enforcement*, 41 TEX. L. REV. 874, 889 (1963). Because the investigation is conducted by, and the judgment exercised by, the EEOC, the district court exercises no real discretion to which the court of appeals is bound to defer. Rather, the district court makes a determination, usually on a fully composed and undisputed record, whether the Commission's subpoena lies within or outside of the broad range of authority accorded by the statute. That is a legal conclusion of the sort the court of appeals is perfectly situated to make.

In sum, the district court's inquiry into relevance does not encompass findings of historical fact, nor does such inquiry rely on the district court's supposedly superior knowledge of the parties or the underlying dispute.[11] Instead, the district court's decision is more akin to a determination under Federal Rule of Civil Procedure 12(b)(6), where the court assesses the potential probative or investigatory force of the requested evidence (or

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[11] Although Petitioner contends that this inquiry is "essentially factual in nature," Pet. Br. 25, citing *FTC v. Lonning*, 539 F.2d 202, 210 n.14 (D.C. Cir. 1976), the "fact" proposition "crept into the case law without much thought" or supporting authority. *UPS*, 587 F.3d at 141 (Newman, J., concurring).

evidence that may be generated thereby), and merely decides whether the it satisfies the legal standard. District courts are not better situated to make such decisions about statutory authority than are appellate courts. *See Fenton*, 474 U.S. at 114 (where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law").

III. The Proposed Abuse-of-Discretion Standard Is Unsound.

Both parties and *amici* engage in a detailed functional analysis of why, in their view, an abuse-of-discretion standard may be more efficient. *See* Pet. Br. 21, 28–29; Resp. Br. 26–33. That standard is foreclosed for reasons already given, but, regardless, they misconceive the nature of the judicial inquiry, and a functional analysis favors *de novo* review.

A. District Courts Are Not Afforded Discretion in the Enforcement of EEOC Subpoenas.

The parties' proposed standard of review is premised on a fundamental error: an abuse-of-discretion standard applies only when Congress has vested the district court with discretion, or where the district court's discretion is inherent. Here, as noted above, the only discretion involved belongs to the EEOC, not to the district court. *See Mach Mining*, 135 S. Ct. at 1653 (noting, in analyzing judicial review of conciliation actions, the "expansive discretion that Title VII gives the EEOC," which

limits the court's function to "ensuring that [the EEOC] follows the law"); *Randstad*, 685 F.3d at 451 (recognizing that decision as to scope of subpoena is a matter of EEOC discretion); *see also Okla. Press*, 327 U.S. at 201 ("The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, *in the Administrator's judgment*, the facts thus discovered should justify doing so." (emphasis added)).

Petitioner (Br. 20) relies on a Sixth Circuit decision concluding that because section 11 of the NLRA provides that a district court "shall have jurisdiction" to enforce a subpoena, 29 U.S.C. § 161(2), "enforcement of the subpoena is ... confided to the discretion of the District Court, which is to be judicially exercised." *Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450, 453 (6th Cir. 1941). The Sixth Circuit's proclamation is a non sequitur.

First, a district court can never act without jurisdiction. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). Thus, under the Sixth Circuit's untenable reasoning, a statute granting the district court jurisdiction would *always* result in the district court's "discretion" and deferential appellate review. But a grant of jurisdiction simply declares the district court's power to decide the case, not how it is to decide the case or the standards it should employ. In any event, the

APA supersedes the *Goodyear* holding, and provides that a district court "shall sustain" a subpoena if it "is in accordance with law." 5 U.S.C. § 555(d). That provision applies to NLRB (and EEOC) subpoenas, *see, e.g., D.G. Bland Lumber Co. v. NLRB*, 177 F.2d 555, 558 (5th Cir. 1949), and forecloses any claim of district court discretion.[12]

Second, Title VII's governing statutory language does not provide the district court with discretion with regard to EEOC subpoenas. Rather, Section 2000e-8(a) expressly provides that the "Commission or its designated representative *shall at all reasonable times have access* to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against *that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.*" 42 U.S.C. § 2000e-8(a) (emphasis added). The statute further recognizes the Commission's discretion to decide upon the documents it needs in the Act's revocation provisions, which authorizes revocation of a subpoena "if in its opinion" the subpoena is unrelated to the investigation or lacks sufficient particularity. 29 U.S.C. § 161(1); 42 U.S.C. § 2000e-9. Nothing in Title VII confers any form of discretion upon the district court; the court simply determines the subpoena's legality.

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[12] For the same reason, the EEOC's suggestion that invocation of "the court's process," *Powell*, 379 U.S. at 58, is enough to create discretion in the district court, Resp. Br. 20, is unsound. Every civil action involves invocation of judicial process.

B. The Abuse-of-Discretion Standard Does Not Apply to Determinations of a Person's Statutory Duty to Comply with an Agency Subpoena.

The parties point to no case in which this Court has ever adopted an abuse-of-discretion standard for review of the ultimate determination whether an agency has complied with statutory or constitutional limits or whether a party has a duty to comply with an agency order. These are questions of law (including mixed questions of fact and law). *Brimson*, 154 U.S. at 488. By contrast, district courts are deemed to have discretion over certain subsidiary rulings that concern the supervision of its own litigation, involve fact-intensive determinations that turn on witness credibility and the evaluation of demeanor, or invoke a district court's equitable or inherent powers. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991); *Fenton*, 474 U.S. at 114; *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

Consistent with that conceptual understanding, the Court has endorsed an abuse-of-discretion standard for decisions involving matters of "case management, discovery, and trial practice,"[13]

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[13] *Clarke*, 134 S. Ct. at 2368 (decision to allow examination of IRS agents); *Crawford-El v. Britton*, 523 U.S. 574, 598–601 (1998) (reasoning that because Federal Rule of Civil Procedure 26 "vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery," and because the district court has "the most experience in managing cases," the district court is entitled to "broad discretion in the management of the factfinding process").

evidence,[14] procedure,[15] sanctions,[16] remedy,[17] sentencing,[18] and fees and costs.[19] Enforcement of an agency subpoena presents no such matter.

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[14] *See, e.g.*, *Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997) ("The standard of review applicable to the evidentiary rulings of a district court is abuse of discretion."); *GE v. Joiner*, 522 U.S. 136, 141–47 (1997) (decision to strike expert testimony).

[15] *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 238 (1997) (Fed. R. Civ. P. 60(b)(5) motion rulings); *Denton v. Hernandez*, 504 U.S. 25, 30–33 (1992) (dismissals of frivolous complaints); *Renico v. Lett*, 559 U.S. 766, 773 (2010) (declaration of mistrial); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288–89 (1995) (stay of declaratory judgment action); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257–61 (1981) (*forum non conveniens* ruling); *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 555 (2014) (remand order); *United States v. Taylor*, 487 U.S. 326, 335–36 (1988) (choice to dismiss an indictment with or without prejudice).

[16] *See, e.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 404, 404–05 (1990) (holding that the imposition of Federal Rule of Civil Procedure 11 sanctions should be reviewed for abuse-of-discretion because this will "enhance these courts' ability to control the litigants before them," and because the district court is "best situated to determine when a sanction is warranted" in light of the local bar's litigation practices); *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) (sanction under Fed. R. Civ. P. 37 for failing to comply with a discovery order).

[17] *See, e.g.*, *eBay*, 547 U.S. at 391 (permanent injunction); *Ashcroft v. ACLU*, 542 U.S. 656, 664–65 (2004) (preliminary injunction); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424–25 (1975) (backpay under Title VII); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1934 (2016) (enhancement of damages in a patent case).

[18] *See, e.g.*, *Koon*, 518 U.S. at 98.

[19] *See, e.g.*, *Pierce*, 487 U.S. at 555–59 (award of attorneys' fees under the Equal Access to Justice Act); *HighMark Inc. v.*

The principal case upon which the parties rely in support of an abuse-of-discretion standard, *Nixon*, 418 U.S. 683, is exactly the kind of case that involves traditional district court discretion—the issuance of its own judicial process based on considerations of trial management—and is inapposite.

At issue in *Nixon* was enforcement of a criminal pretrial subpoena *duces tecum*. 418 U.S. at 702. Such subpoenas serve "to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials." *Id.* at 698–99. Under Federal Rule of Criminal Procedure 17(c),

> the moving party must show (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id. at 699–700 (footnote omitted). This Court held that "[e]nforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court *since the necessity for the subpoena most often turns upon a determination of*

Allcare Health Mgmt. Sys., 134 S. Ct. 1744, 1748 (2014) (award of attorney's fees under 35 U.S.C. § 285).

factual issues," and thus would not be disturbed on appeal absent a showing that the trial court acted arbitrarily or without record support. *Id.* at 702 (emphasis added).

None of the considerations that supported abuse-of-discretion review in *Nixon* apply here. This case does not involve judicial subpoenas and a district court's discretionary control of its own compulsory process or the management of its trials, nor does the enforceability depend upon the "factual determinations" set forth in *Nixon*. An agency's subpoena power is "'not derived from the judicial function.'" *Powell*, 379 U.S. at 57 (quoting *Morton Salt*, 338 U.S. at 642–43). Unlike *Nixon*, which involved a collateral order within a criminal trial concerning the court's own process, an order enforcing an administrative subpoena is the final order resolving a separate, "self-contained" judicial proceeding between an administrative agency and the respondent. *Cobbledick v. United States*, 309 U.S. 323, 330 (1940). Thus, it would be illogical to extend *Nixon*'s holding to subpoenas issued by administrative agencies or executive departments, which are enforced in independent civil actions, and do not involve the exercise of a district court's discretionary judicial powers.

Furthermore, the subpoenas in *Nixon* and this case serve decidedly different functions. The EEOC's subpoena power is coextensive with its "'power of inquisition,'" *Powell*, 379 U.S. at 57 (quoting *Morton Salt*, 338 U.S. at 642), and serves an investigatory function. On the other hand, the subpoena at issue in *Nixon*, intended to expedite the trial, was definitively "not intended to provide a means of discovery." 418

U.S. at 698; *Bowman Dairy Co. v. United States*, 341 U.S. 214, 219 (1951) ("Rule 17(c) was not intended to provide an additional means of discovery."). These fundamental differences between pretrial criminal and administrative subpoenas make *Nixon*'s holding inapplicable here.

Indeed, *Nixon* does not even apply to all forms of judicial subpoenas: namely, grand jury subpoenas (to which administrative subpoenas have sometimes been compared, *Okla. Press*, 327 U.S. at 216–17). "A grand jury subpoena is ... much different from a subpoena issued in the context of a prospective criminal trial," and "many of the rules and restrictions that apply at a trial do not apply in grand jury proceedings." *United States v. R. Enters., Inc.*, 498 U.S. 292, 297–98 (1991). "Unlike [a] court, whose jurisdiction is predicated on a specific case or controversy, the grand jury 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" *Id.* at 297 (quoting *Morton Salt*, 338 U.S. at 642–43). A grand jury maintains a "functional independence from the Judicial Branch," *United States v. Williams*, 504 U.S. 36, 48 (1992), and is "free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it." *United States v. Dionisio*, 410 U.S. 1, 17–18 (1973).

Accordingly, this Court held that "the *Nixon* standard does not apply in the context of grand jury proceedings." *R. Enters.*, 498 U.S. at 300. In place of the factual determinations of the *Nixon* test to which an appellate court must defer, this Court defined a test for grand jury subpoenas that is strictly legal in

nature and divorced from any considerations of trial management: "the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *Id.* at 301. Although the courts of appeals reflexively apply the abuse-of-discretion standard to grand jury subpoenas, *see* Resp. Br. 24–25, the *R. Enterprises* test of relevance as a matter of law involves no discretionary district court determinations requiring deference from the appellate court. But if the abuse-of-discretion standard does apply to grand jury subpoenas—an issue the Court need not decide—it is only because the grand jury (although functionally independent) is "an appendage of the Court" without its own subpoena power, *Williams*, 504 U.S. at 66 (quoting *Brown v. United States*, 359 U.S. 41, 49 (1959)), and thus "a part of the judicial process," *Cobbledick*, 309 U.S. at 327. Administrative agencies are on opposite footing. The *Nixon* standard of review should not be applied to enforcement of administrative subpoenas issued by an *independent* branch of government pursuant to its *independent* statutory authority.

C. Congress Has Not Ratified the Abuse-of-Discretion Standard.

Invoking *Lorillard v. Pons*, 434 U.S. 575 (1978), the EEOC claims that Congress ratified the abuse-of-discretion standard when it incorporated the NLRA procedures into Title VII in 1972 because the Sixth Circuit in *Goodyear* and three other circuits had applied such a standard in NLRA subpoena cases. Resp. Br. 25–26.

That argument falters for a number of reasons. First, nothing in the NLRA (or Title VII) addresses appellate review, and thus there is nothing that could be ratified by incorporation of section 11 of the NLRA into Title VII. Second, the proper appellate standard of review for administrative subpoenas is not statute-specific, and indeed the *Oklahoma Press/Morton Salt* standard derives from the Fourth Amendment. Third, Congress adopted a rule of mandatory enforcement of administrative subpoenas that are "in accordance with law," 5 U.S.C. § 555(d), which is inconsistent with abuse-of-discretion review. The *Lorillard* ratification canon cannot be invoked to impliedly repeal the APA as to NLRB and EEOC subpoenas.

Finally, the *Lorillard* canon applies only "when judicial interpretations have settled the meaning of an existing statutory provision ...." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85, (2006) (internal quotation marks omitted). Even as to NLRA cases before 1972, there was no uniform rule; the Fifth Circuit, for example, applied the APA "in accordance with law" standard in NLRA cases, which is inconsistent with abuse-of-discretion review. *See D.G. Bland Lumber*, 177 F.2d at 558; *see also NLRB v. Anchor Rome Mills*, 197 F.2d 447, 448-49 (5th Cir. 1952). Moreover, Congress in 1972 was presumptively aware of *Brimson*, which unequivocally holds that the "duty to answer the questions propounded to them, and to produce the books, papers, documents, etc., called for" is a question of "law exclusively," 154 U.S. at 488, as well as the multiple decisions where this Court independently determined the enforcement of

administrative subpoenas. There can be no ratification when "there was no settled ... interpretation ... about which Congress could have been aware." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 531 (1994).

D. *De Novo* Review Does Not Encourage Marginal Appeals and Will Not Materially Delay EEOC Investigations.

The parties and *amici* assert that a deferential review standard would encourage fewer appeals and foster judicial efficiency. Pet. Br. 28–29; Resp. Br. 26–33; Equal Employment Advisory Council ("EEAC") Br. 15–26; Professors' Br. 11. But nothing substantiates that *de novo* review fosters frivolous appeals, or otherwise materially delays EEOC investigations. Congress authorized an appeal as of right, and complaints about having to litigate appeals simply quarrel with the statutory scheme.

To begin, judicial efficiency is not solely a matter of speed of adjudication. *De novo* review unifies precedent and clarifies legal principles. *Cooper Indus.*, 532 U.S. at 436. Unity in precedent on recurring issues will, in fact, streamline litigation, for there will be fewer subpoena disputes and appeals as trial court decisions become more predictable and consistent. More importantly, *de novo* review promotes justice. There should be uniformity in decisions as to whether the EEOC can seek access to other test takers through pedigree information in investigating charges of systemic discrimination in the administration of employment tests, and the factors that may justify denial of such access to the Commission. This and other relevance

determinations are not "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce*, 487 U.S. at 562 (internal quotation marks omitted). It does not serve employers, employees, or the public interest for such decisions to vary with the inclinations of a particular district judge.

There is also no basis to the parties' suggestion that filing an appeal will delay an EEOC investigation. The EEOC's appeal of an order quashing a subpoena does not cause delay; the quashing order itself curtails the investigation. Nor does delay result from a respondent's appeal of an order enforcing the subpoena; the investigation continues apace except in the extraordinary circumstance where a stay is granted, which "is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal citation omitted). Courts have frequently denied motions to stay enforcement of EEOC subpoenas to avoid undue delay. *See, e.g.*, *EEOC v. Aerotek, Inc.*, 815 F.3d 328, 331–32 (7th Cir. 2016); *EEOC v. Optical Cable Corp.*, No. CIV. A. 98-MC-02-R, 1998 WL 236930, at *3 (W.D. Va. May 1, 1998).[20]

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[20] For example, the EEOC successfully opposed a stay before the Seventh Circuit "to prevent any further delay in the Commission's investigation." Opp. to Mot. to Stay, *EEOC v. Aerotek, Inc.*, No 15-1690 (7th Cir. July 28, 2015); *see also id.*, Dkt. No. 23 (order denying stay); *see also, e.g.*, *EEOC v. A.E. Staley Mfg. Co.*, 711 F.2d 780, 783 (7th Cir. 1983); *EEOC v. Allstate Ins.*, No. 81-C-518, 1981 WL 261, at *2–3 (N.D. Ill. May 14, 1981); *EEOC v. Laidlaw Waste, Inc.*, 934 F. Supp. 286, 291 (N.D. Ill. 1996) (denying stay to avoid delay of investigation).

Furthermore, it is rare for the EEOC to seek relief in the district court, which in turn makes appeals a rarity. The EEOC filed only 28 subpoena enforcement actions in 2016, compared to 33 in 2005. *See* EEAC Br. 18–19. For perspective, the EEOC had an inventory of 73,500 charges at the end of 2016. *Id.* at 18. Among those few actions, the parties do not claim (much less demonstrate) that appeals are more frequent in the Ninth Circuit, where *de novo* review is available. Unlike Rule 11 sanctions, where this Court concluded that *de novo* review might encourage marginal appeals of rulings "rooted in factual determinations," *Hartmarx Corp.*, 496 U.S. at 401, 404, here the inquiry is predominantly legal. Few employers with good arguments that the EEOC overstepped its bounds are likely to be deterred from pursuing an appeal because review will be for abuse-of-discretion (especially if they can assert legal errors that are reviewed without deference as *per se* abuses of discretion).

The parties and *amici* also advance the false notion that a deferential standard streamlines appellate review, purportedly avoiding wasteful replication of the district court's fact-intensive determination. Pet. Br. 28–29; Resp. Br. 30; EEAC Br. 11–12. As shown *supra* at 22-29 and 42-45, the characterization of the district court's inquiry as fact-intensive is incorrect. Regardless, abuse-of-discretion review does not mean that an appellate court can dispose of the appeal more speedily. It still must conduct careful review of the law, the record, and the arguments of the parties. The standard of review only affects the deference it must ultimately give to the district court's ruling.

At the end of the day, an enforcement action presents the question of the respondent's duty to comply with the subpoena, and the district court must enforce that subpoena to the extent it is "in accordance with law." 5 U.S.C. § 555(d). An appellate court properly reviews that determination *de novo*.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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ADDENDUM

ADDENDUM

UNITED STATES CODE

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I. THE AGENCIES GENERALLY

CHAPTER 5. ADMINISTRATIVE PROCEDURE

SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer

the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

RECORD AND BRIEFS

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No. 15-1248

IN THE
Supreme Court of the United States

MCLANE COMPANY, INC.,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* LAW PROFESSORS SUPPORTING PETITIONER

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BRIEF FOR *AMICI CURIAE* LAW PROFESSORS SUPPORTING PETITIONER

INTEREST OF *AMICI CURIAE*

Amici are law professors who teach and write about federal procedure and administrative law.[1] Both as academics and as teachers of future practitioners and judges, *amici* have an interest in ensuring that federal standards of review promote the sound administration of justice. They regard the allocation of adjudicative responsibilities to the different federal courts based on their institutional competencies to be of paramount importance. In

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution. Letters from counsel of record for each party consenting to the filing of this *amici* brief are on file with the clerk's office.

resolving this case, the Court's guidance will transcend the specific context of EEOC subpoenas. To that end, *amici* write to urge the Court to unify the circuits and give deference to district courts' determinations of relevance in administrative subpoena enforcement actions. *Amici* include:

- Lonny Hoffman, Professor of Law, University of Houston Law Center;
- Dru Stevenson, Professor of Law, South Texas College of Law Houston; and
- Darren Bush, Professor of Law, University of Houston Law Center

SUMMARY OF ARGUMENT

The Ninth Circuit erred by creating a division among the circuits regarding the appropriate standard of review for a district court's determination of relevance in the context of administrative subpoenas. The other courts of appeals have correctly recognized that, on the basis of institutional competency, whether to enforce such a subpoena is the kind of decision on which the appellate courts should defer to the district courts and should be overturned only if a district court abuses its discretion. This allocation of authority reflects the district courts' superior view of and experience with relevance determinations and preserves appellate courts' resources for articulating clear legal rules and ensuring that the law is both coherent and consistently applied.

ARGUMENT

I. Relative Institutional Competency Should Help Determine Standards Of Review

This Court has observed that the proper standard of review sometimes "has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller* v. *Fenton*, 474 U.S. 104,

114 (1985). The district courts have long been recognized as better positioned to decide fact-intensive questions by virtue of their front-line vantage of the case, issues, and parties. See, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). But a district court is also better positioned to decide questions efficiently when those questions are not well suited for appellate courts' expertise in prescribing rules of decision, such as when the question is not readily reduced to specific, discrete principles or is subject to boundless potential contingencies that a simple rule could not well encompass. See *Pierce* v. *Underwood*, 487 U.S. 552, 561-562 (1988). In either scenario, deference to the district court furthers the sound administration of justice.

A. District courts are the most competent decision-makers when they have a superior view of the circumstances that generate a decision

Two principal factors distinguish and enhance the determinations of the district court. First, trial judges typically possess exclusive knowledge of the case. See *Pierce*, 487 U.S. at 560. "By reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record * * * ." *Ibid.* (discussing whether the government's position is substantially justified for purposes of fee-shifting statute). In addition, the district court's knowledge is shaped by the full sensory and intangible experience of the case. As evocatively described by the Supreme Court of Mississippi, the trial judge "smell[s] the smoke of battle." *Culbreath* v. *Johnson*, 427 So. 2d 705, 708 (Miss. 1983); see also Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 664 (1971) (describing "the most pointed and helpful" reason for deferring to the trial court as resting "paradoxically, [on] the superiority of his nether position").

Relatedly, a district court also often has unique

knowledge arising out of its long history with a given case—the district court "lives with the case" for far longer and with greater intimacy than any other judge. See *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014). This familiarity with the case, parties, and issues enables the court "to marshal the pertinent facts and apply [a] fact-dependent legal standard." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (deferring to district court's Rule 11 determinations).

Second, even where the district court lacks any special knowledge, it may still have a superior view by virtue of its regular experience making similar decisions. "District courts have an institutional advantage over appellate courts in making [the decision to depart from sentencing guidelines], especially as they see so many more Guidelines cases than appellate courts do." *Koon* v. *United States*, 518 U.S. 81, 98 (1996) (overruled by statute, later reinstated as recognized in *Rita* v. *United States*, 551 U.S. 338, 361-362 (2007) (Stevens, J., concurring)); see also *Buford* v. *United States*, 532 U.S. 59, 64-65 (2001) (deferring to a district court's determination on the basis of the district court's experience with similar decisions). A court accustomed to making decisions based on the totality of the record will do so with greater ease than the appellate court. *Pierce*, 487 U.S. at 560 (considering the "unusual expense" borne by an appellate court unaccustomed to reviewing an entire record).

B. District courts are the most efficient decision-makers when the courts of appeals' rulemaking role is unnecessary or impractical

Appellate courts are better positioned to articulate rules of law and ensure coherent development of the law. Because appellate judges sit in panels, multiple judges simultaneously focus on difficult and important questions precisely because of the important precedential value of

the resulting answers. See, *e.g.*, *Mucha* v. *King*, 792 F.2d 602, 605-606 (7th Cir. 1986) (determining that an appellate court's "main responsibility is to maintain the uniformity and coherence of the law"). "It stands to reason that the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law." *United States* v. *McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984) *(en banc)*.[2]

But not all decisions that lower courts make are readily "amenable to regulation by rule," and in such circumstances, there are "good reasons for conferring discretion on the trial judge * * * ." *Pierce*, 487 U.S. at 561-562 (internal quotation and punctuation omitted). Appellate court precedent provides only "minimal help" where the legal question at issue is case-specific, where the issue is multifarious and not easily resolved with reference to a rule, and where the consequences of the decision are insubstantial. *Buford*, 532 U.S. at 66; *Pierce*, 487 U.S. at 563.

This Court recognized as one such case-specific question the determination of whether—for purposes of a fee-shifting statute—the government's position in a specific case was substantially justified. *Pierce*, 487 U.S. at 562. The Court described the question as "precisely such a multifarious and novel question, little susceptible, for the time being at least, of useful generalization* * * ." *Ibid.*

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[2] Although courts regularly describe *McConney* as overruled by *Estate of Merchant* v. *C.I.R.*, 947 F.2d 1390 (9th Cir. 1991), *e.g.*, *Garvais* v. *United States*, 421 F. App'x 769, 770 (9th Cir. 2011) (recognizing overruling), *McConney* lives on as the ancestor of the Ninth Circuit's declaration that it reviews administrative subpoena enforcement determinations *de novo*. See Pet. App. 8 n.3 (citing *NLRB* v. *North Bay Plumbing, Inc.*, 102 F.3d 1005, 1007 (9th Cir. 1996), which cites *Reich* v. *Montana Sulphur & Chem. Co.*, 32 F.3d 440, 443 (9th Cir. 1994), which cites *EPA* v. *Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 446 (9th Cir. 1988), which cites *McConney*).

(internal quotation omitted); see also *Highmark*, 134 S. Ct. at 1748-1749 (reaching the same conclusion regarding a different fee-shifting statute). The Court also noted that "[i]f this were the sort of decision that ordinarily has such substantial consequences, one might expect it to be reviewed more intensively." *Pierce*, 487 U.S. at 563.

Similarly, because "'[f]act-bound resolutions cannot be made uniform through appellate review,'" an appellate court's review of Rule 11 sanctions "is unlikely to establish clear guidelines for lower courts; nor will it clarify the underlying principles of law." *Cooter*, 496 U.S. at 405 (quoting *Mars Steel Corp.* v. *Continental Bank N.A.*, 880 F.2d 928, 936 (7th Cir. 1989)).

The determination that previous convictions were functionally consolidated for sentencing is "a minor, detailed, interstitial question," not "generally recurring" nor "readily resolved by reference to general legal principles and standards alone." *Buford*, 532 U.S. at 65. The case-specific, detailed factual circumstances critical to the determination "limit[] the value of appellate court precedent." *Id.* at 65-66.

Where an appellate court's specialization in rulemaking is not brought to bear to improve the decision of the district court, principles of judicial economy favor deference. "The judgment of three appellate judges is not necessarily better than the judgment of one district judge, but it is assuredly more costly to obtain and interpret." *Mars Steel Corp.*, 880 F.2d at 936. Considerations of cost, delay, and finality, as well as preferring not to overwhelm the appellate court's limited resources, all strengthen the decision to defer to the district court. See *Pierce*, 487 U.S. at 561 (considering the "investment of appellate energy" required by less deferential reviews); see also *Anderson* v. *City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) (establishing the clearly-erroneous standard for review of factual findings because, in part,

the parties "have already been forced to concentrate their energies and resources on persuading the trial judge" and "requiring them to persuade three more judges at the appellate level is requiring too much").

This divide in relative competence generally mirrors the division between questions of fact and questions of law, but this generalization is incomplete. Many factual determinations have legal components that are nonetheless better resolved by the district court. As the Court put it in *Highmark*, "[a]lthough questions of law may in some cases be relevant to the [fee-shifting] inquiry, that inquiry generally is, at heart, 'rooted in factual determinations.'" 134 S. Ct. at 1749 (quoting *Cooter*, 496 U.S. at 401). Conversely, when district courts have no better view of the facts than appellate courts, the "factual" label does not necessarily justify deference. See *Thompson* v. *Keohane*, 516 U.S. 99, 114 (1995) (declining to defer to district court's determination of whether defendant was in custody for *Miranda* purposes, noting that unlike in voir dire or witness competency questions, "the trial court does not have a first-person vantage"); *Miller*, 474 U.S. at 117 (deferring to state trial court's resolution of underlying fact questions but not to its determination that a confession was voluntarily made, noting that "the state-court judge is not in an appreciably better position than the federal habeas court to make that determination"). Rather than attempt to characterize relevance determinations as ones of "fact" or "law" and allow the standard of review to flow mechanically from that determination, a holistic review of which institutional actor has the advantage in making the determination reveals the proper standard of review.

II. Relevance Determinations Are Best And Most Efficiently Made By The District Courts

Enforcement determinations for EEOC subpoenas require the district court to balance the relevance of the

information sought against "any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose." *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 72 n.26 (1984). Though "relevant" is "not especially constraining," it is a constraint nonetheless. *Id.* at 68. *Some* judicial body must assess when the agency so strains the tether of relevance that it exceeds its authority. Because this decision can only be made with reference to the specific information requested and the nature of the underlying case, and because appellate rulemaking would be inefficient and largely without benefit, relevance determinations necessarily fall within the ambit of the district courts.

A. The district court has a unique and superior view of the relevance determination

District courts *routinely* make relevance determinations. Trial courts frequently consider the relevance of information requested in ordinary civil discovery under Federal Rule of Civil Procedure 26(b)(1) and admit only relevant evidence under Federal Rule of Evidence 401. Although what is "relevant" is more constrained in ordinary civil cases than for the purposes of EEOC's subpoena power, the decision nonetheless still involves balancing relevance and burden, and is also reviewed with deference to the trial court's discretion. *E.g.*, *Republic of Arg.* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2254 (2014) (describing the general rule that *subject to the district court's discretion*, parties may obtain discovery of nonprivileged matters relevant to either party's claims or defenses); *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008) (according broad discretion to district court's relevance determinations under Federal Rule of Evidence 401 in "deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters"). The district court brings its experience overseeing ordinary civil production

to assessing whether the demand for information is too broad or made with improper purpose.

This case illustrates when a district court may possess important data that only it can know. The district court was undoubtedly influenced by its experience with the same parties in an earlier case brought by the EEOC to enforce a subpoena issued under the ADEA. See Pet. App. 5. After a hearing, the District Court determined that the pedigree information sought was irrelevant to the EEOC's ADEA investigation, but otherwise enforced the subpoena. *EEOC* v. *McLane Co.*, No. CV-12-615-PHX-GMS, 2012 WL 1132758, at *5, 7 (D. Ariz. Apr. 4, 2012). Only then did the EEOC bring an enforcement action seeking the identical pedigree information in connection with the Ochoa investigation. The EEOC dismissed its appeal of the ADEA suit, leading the Ninth Circuit to consider the Title VII charge alone. Pet. App. 5 n.1. The Ninth Circuit did not consider whether the earlier subpoena indicated that the information sought was not genuinely relevant to the latter, as perhaps it might have if it had the intimate interactions with the parties in the ADEA case.

In addition to the earlier case, the district court also had the opportunity to question the attorneys at multiple hearings. Pet. Br. 16. The district court apparently relied on statements made at the hearing in determining that the primary purpose for which the EEOC sought the pedigree information was not relevant to the Ochoa investigation. Pet. App. 28.

The experience the district court had with the parties in this case, as well as with relevance determinations generally, provides ample assurance that its decision is infused with data that the appellate court could not replicate. This superior access to the crucial determinants of a ruling mean that the district court is best situated to efficiently decide the relevance question—unless the ap-

pellate court's rulemaking responsibility is particularly needed. As described below, no such need exists, and the Court's opinion would aid the clarity of the law by explaining why that is true and why it means that deference to district courts' rulings in comparable circumstances is justified.

B. Granular rulemaking by the courts of appeals is unnecessary in determining relevance

Some kinds of information may be categorically relevant to certain types of cases, but whether most information that is requested is relevant must be determined on a case-by-case basis. While the Ninth Circuit believed that social-security numbers were relevant to Ochoa's sex-discrimination charge, it does not follow that social-security numbers must be relevant to other sex-discrimination charges. The "rule" announced has little applicability outside the circumstances of this one case.

Not only is the benefit to future litigants slim, the receipt of the pedigree information also provides marginal help to Ochoa. It appears she is no more likely to obtain the relief sought if the EEOC succeeds or fails in obtaining the requested information—indeed, the information may have nothing to do with the underlying litigation issues *at all*.[3] See Pet. Br. 45-51. Even if interviews with individuals "might cast light" that a detailed statistical picture does not, the light cast is so wan that it fails to justify the tremendous appellate effort to capture it.

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[3] The district court echoed McLane's contention that the EEOC is "trolling for possible complainants." Pet. App. 29. The EEOC may also be seeking this information because it must meet a quota of litigation pursued on behalf of large groups of employees, which it calls "systemic cases." See U.S. EEOC, Fiscal Year 2017 Congressional Budget Justification 26 (2016) (describing a goal set in 2012 to maintain or increase the percentage of systemic cases litigated). Without the pedigree data, Ochoa's complaint remains that of a single employee and cannot help the agency meet its quota.

Whether the requested information is necessary is not the standard for relevance, of course, but the lack of "substantial consequences" flowing from the determination demonstrates that appellate review of this issue is not critical. See *Pierce*, 487 U.S. at 563.

Whatever slight benefit the Ninth Circuit's decision may provide to future cases or to Ochoa is outweighed by the heavy costs of appeal. Ochoa has waited eight years for resolution of her complaint—four of which are since the district court denied enforcement of the subpoena. Pet. App. 2, 5. And while the EEOC has a $67 million litigation budget, appeals are expensive for all parties. See U.S. EEOC, Fiscal Year 2017 Congressional Budget Justification 22 Tbl.4 (2016).

A system that facilitates a more rapid march to finality would benefit all involved. Ochoa of course would benefit from the resolution of her complaint—but so would the agency. The EEOC received nearly 90,000 new complaints in 2015 alone, a volume that necessitates only selective enforcement. See *id.* at 29. For the same reason, finality of district court decisions protects the public fisc. But finality also benefits the employers being investigated and the public interest. For eight years, McLane has had no resolution on whether its strength test is acceptable, forcing it (and others contemplating similar tests) to choose between protecting its employees by monitoring their ability to safely do their jobs and risking subsequent EEOC violations.

Finally, discretionary review eases the burden on the appellate court. The Ninth Circuit is already slower than its sister courts. See 2015 Ninth Circuit Annual Report 59 (reporting that the median time interval for cases terminated on the merits in the Ninth Circuit is 6.9 months longer than the national average). As the Ninth Circuit itself has said: "It can hardly be disputed that application of a non-deferential standard of review requires

a greater investment of appellate resources * * * . Appellate courts could do their work more quickly if they applied the clearly erroneous standard in most circumstances * * * ." *McConney*, 728 F.2d at 1201 n.7 (9th Cir. 1984).

III. The Standard Of Review For Relevance Determinations Will Spread Beyond EEOC Subpoena Enforcement Actions

Many executive branch agencies are authorized to subpoena information "relevant" to their respective domains. The question of which standard of review to use when assessing "relevance" spans across all administrative subpoena enforcement actions, not just actions brought by the EEOC. When this Court announces the standard of review for relevance determinations, it bears consideration that its judgment will affect these other administrative subpoenas. A non-deferential standard of review would spread the burdens identified in Part II (B), *supra*, beyond the limited number of enforcement actions brought by the EEOC and across the entire universe of administrative subpoenas.

A 2002 Department of Justice report on the use of administrative subpoenas cataloged 335 grants of subpoena power to executive agencies. *City of Los Angeles, Cal.*. v. *Patel*, 135 S. Ct. 2443, 2453-2454, (2015) (citing Office of Legal Policy, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities 3, online at http://www.justice.gov/archive/olp/rpt_to_congress.htm). Many of these subpoena powers are limited to information "relevant" to a matter under the agency's purview. For example, the IRS may summon "'any books, papers, records, or other data which may be relevant or material' to a particular tax inquiry." *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 813 (1984) (quoting 26 U.S.C. § 7602). FTC subpoenas, too, are confined to items relevant to an

authorized FTC inquiry. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 208-209 (1946).

The scope of some of these agencies' investigative authorities may vary from that of the EEOC. See *Shell Oil*, 466 U.S. at 64 & n.14 (noting that, unlike the FTC's plenary investigative power, the EEOC can only investigate in connection with a filed complaint). Nonetheless, appellate courts regularly treat all administrative subpoenas—regardless of originating agency or authorizing statute—as guided by the principles laid out in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), an FTC subpoena enforcement action. *E.g.*, *United States* v. *Construction Prods. Research, Inc.*, 73 F.3d 464, 472 (2d Cir. 1996) (applying *Morton Salt* to evaluate enforcement action brought by Nuclear Regulatory Commission); *In re Sealed Case (Admin. Subpoena)*, 42 F.3d 1412, 1415 (D.C. Cir. 1994) (applying *Morton Salt* in enforcement action brought by Office of Thrift Supervision); *Reich* v. *National Eng'g & Contracting Co.*, 13 F.3d 93, 99 (4th Cir. 1993) (noting that *Morton Salt* sets the standard for enforcing "an" administrative subpoena, in enforcement action brought by OSHA).

This homogenization of administrative subpoenas has led to some cross-pollination of "relevance" across various administrative subpoenas. For example, in *Shell Oil* this Court defined relevance as "virtually any material that might cast light on the allegations against the employer," 466 U.S. at 68-69. The opinion borrowed this language from the definition of relevance established in *Arthur Young & Co.*, an IRS subpoena enforcement case. *Shell Oil*, 466 U.S. at 69 & n.20 (citing 465 U.S. at 813); see also *id.* at 72 n.26 (asserting limits to EEOC subpoena power derived from IRS and FTC subpoena case law). This same *Arthur Young* relevance standard has been applied in subpoena enforcement actions brought by, among others, the FDIC, *In re McVane*, 44 F.3d 1127,

1135 (2d Cir. 1995), the Inspector General of the Department of Defense, *United States* v. *Westinghouse Elec. Corp.*, 788 F.2d 164, 170 (3d Cir. 1986), and the U.S. Attorney in connection with a health care fraud case, *United States* v. *Whispering Oaks Residential Care Facility, LLC*, 673 F.3d 813, 818 (8th Cir. 2012).

Unsurprisingly, given this cross-pollination, courts have also sought guidance on the appropriate standard of review across administrative subpoena case law broadly. *E.g.*, *Adamowicz* v. *United States*, 531 F.3d 151, 158 (2d Cir. 2008) (applying standard of review from an EEOC relevance determination to an IRS subpoena enforcement action). The perhaps thoughtless propagation of the clearly-erroneous standard from an FTC case to an FDIC case and then on to an EEOC case formed the subject of a concurrence by Judge Jon Newman in the Second Circuit. *EEOC* v. *United Parcel Serv., Inc.*, 587 F.3d 136, 140 (2009).

To the contrary of Judge Newman's criticism, a few courts have reasoned their way to a deferential standard of review. *E.g.*, *Ponsford* v. *United States*, 771 F.2d 1305, 1308 (9th Cir. 1985) (determining in an IRS enforcement action that while relevance determinations present "some legal and policy concerns," the nature of the inquiry is essentially factual and therefore reviewed under the clear-error standard); *Goodyear Tire & Rubber Co.* v. *NLRB*, 122 F.2d 450, 453 (6th Cir. 1941) (considering the text of the authorizing statute in leaving subpoena enforcement decision to the discretion of the district court). Through whatever origin, deference is the majority approach across all administrative subpoena enforcement actions.

Regardless of which standard of review this Court chooses, the web of case law connecting administrative subpoena decisions across agencies will likely ensure that the new standard is promulgated far beyond subpoenas

enforced by the EEOC. A *de novo* standard of review would increase the appellate burden and costs not just in the enforcement actions that the EEOC brings, but across subpoenas sought in 334 other contexts. A deferential standard not only avoids these burdens but preserves precedent in the majority of circumstances.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted.

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